TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

[illegible]

No. [illegible]

THE CENTRAL STOCK YARDS COMPANY, APPELLANT

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY

[illegible]

[illegible]

(18,710.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 482.

THE CENTRAL STOCK YARDS COMPANY, APPELLANT,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1902.

road Company, which it alleges is and was at the times hereinafter mentioned, and has been for many years a railroad company organized and existing under and by virtue of the laws of the State of Kentucky, with power to contract and be contracted with, sue and be sued in said corporate name; that said defendant, The Louisville and Nashville Railroad Company, is a citizen and resident of the State of Kentucky.

2. That this suit is between citizens of different States, viz., The Central Stock Yards Company, a citizen of the State of Delaware, and The Louisville and Nashville Railroad Co., a citizen of the State of Kentucky, and that the amount in controversy as will be hereinafter fully shown and set forth, exceeds the sum or value of two thousand dollars exclusive of interest and costs, and that the acts hereinafter complained of and fully set forth are in violation of the Constitution and laws of the United States and — arising thereunder and more particularly in violation of the 3d section of an act of the Congress of the United States, known as "An act to regulate commerce," passed February 4, 1887, and amendments thereto.

3. Plaintiff says that it has constructed a live-stock plant fully equipped with the latest improved and best facilities for, and is now engaged in, receiving, unloading, feeding, watering, caring for, weighing, having sales made of, and reloading live stock that may be consigned to it for care, attention and sale; that its stock yards are on the line of the Southern Railway Company, in Kentucky, in Jefferson county, Kentucky, about nine miles from the terminus of said railway in the city of Louisville; that the said railway company in Kentucky is a duly created, organized and operating railway system in Kentucky under the laws of said State, and that plaintiff's said stock yard has by said Southern Railway Company been duly and regularly established, and now is, a station on the line of said Southern Railway Company in Kentucky, known as "Central Stock Yards, Kentucky," and that said Southern Railway Company has heretofore duly and regularly given notice of the establishment
3 of said station to its agents and all connecting railways and common carriers in Kentucky. Plaintiff says that it (Central Stock Yards Company), is engaged in the stock-yards business, and has ample capital, premises and facilities in every way to carry on properly and economically a stock yard for the reception of shipments of stock, for the sale of same, and for feeding, watering, and caring for, and giving all proper attention thereto while in its custody. Plaintiff further says that it with the Southern Railway Company in Kentucky, has in operation all necessary switches, tracks, platforms, and chutes connecting its said yard with said railway system, and has modern and of the best facilities for receiving, and unloading live stock of every description and in any quantity that may be consigned to it. That said Southern Railway Company has heretofore notified all railways and common carriers including the defendant, The Louisville and Nashville Railroad Company, entering the said city of Louisville, that it, the Southern Railway Company, would be, after November 1, 1901, have ever since been, and that it

is now ready, willing and able to accept at points of physical connection with said Louisville and Nashville Railroad Company, and all other railway companies and common carriers, live stock entering the city of Louisville, consigned to any and all persons at its station, Central stock yards, Kentucky, on its line aforesaid in Jefferson county, Kentucky, and that it would be and is now willing to be responsible from such points of connection, for the delivery of such live stock, and the collection of all charges on same, and would promptly return to such points of connection all empty cars and account for all freight charges collected in the usual way.

4. Plaintiff says that defendant, The Louisville and Nashville Railroad Company, is and was at the times hereinafter mentioned, and has been for many years a railroad corporation created and organized and existing under and by virtue of the laws of the State of Kentucky, with power in its corporate name to contract and be contracted with, sue and be sued, and to conduct and operate a steam railroad in and through Kentucky and elsewhere, with its chief office and terminus in Louisville, Kentucky; that it is so operating and maintaining such road in Kentucky and elsewhere, viz., Tennessee, Alabama, Georgia, Mississippi, Louisiana, Florida, Indiana and Illinois, and is a common carrier engaged in the transportation
4 of passengers and property wholly by railroad along some of its lines, and partly by railroad and partly by water on other of its lines under a common control, management and arrangement for a continuous carriage and shipment from one State of the United States to another State of the United States.

Plaintiff further says that the Southern Railway Company in Kentucky has at Louisville, Ky., at least three points of physical connection between its tracks and the tracks of the defendant, Louisville & Nashville Railroad Company, which are known respectively as the Bergen & Meehan switch or connection, the Fourth Avenue connection and the Seventh and Magnolia Streets connection. The Bergen & Meehan Co. switch is at the intersection of the said Southern Railway Company's tracks and the tracks of the said Louisville & Nashville Railroad Company at or near Floyd street, or between Floyd and Brook streets, and is about fourteen hundred and seventy-five (1475) feet in length. It says that about nine hundred and seventy-five (975) feet of said Bergen & Meehan switch or siding and physical connection between the tracks of said Southern Railway Company in Kentucky and the tracks of the defendant Louisville & Nashville Railroad Company are owned by the Southern Railway Company in Kentucky, and about five hundred (500) feet of said switch or siding and physical connection is known as the Bergen & Meehan private switch, but that the defendant Louisville & Nashville Railroad Company, has the right to and does use said Bergen & Meehan five hundred (500) feet of said siding or switch, and same forms a connection between the tracks of the Southern Railway Company in Kentucky and the tracks of the defendant Louisville & Nashville Railroad Company, and is only about twenty-two hundred (2200) feet in trackage from plaintiff's plant and the station in Jefferson county, Kentucky, on the line of the Southern Railway Company in

Kentucky, known as Central stock yards, Kentucky; that the Fourth Avenue connection is only about one hundred and twenty-eight (128) feet in length, and is about equally owned by the defendant Louisville & Nashville Railroad Company and the Southern Railway Company in Kentucky, and is about half a mile from plaintiff's plant, and the station in Jefferson county, Kentucky, on the line of the Southern Railway Company in Kentucky, known as Central stock yards, Kentucky; that the Seventh and Magnolia Streets connection consists of a track in length about twenty-four hundred and fifty-
5 four (2454) feet with siding in connection therewith in length about eleven hundred and seventy-two (1172) feet; that upon said main-track connection and siding there can be handled about seventy-four (74) cars at one time of interchanged traffic of the one railway company or system with the other, and that said point of physical connection is only about one mile and a half from plaintiff's plant and the station in Jefferson county, Kentucky, on the line of the Southern Railway Co. in Kentucky, know- as Central stock yards, Kentucky; and that at said three points of physical connection between the tracks of the said Southern railway and the tracks of the Louisville & Nashville Railroad Company, the said two railway systems have heretofore received and delivered, and are now receiving and delivering each one to the other, and from the other, freight, other than live stock consigned to Central stock yards, in car-load lots and less for delivery to consignees on the track or tracks of one or the other.

6. Plaintiff says that the defendant, The Louisville and Nashville Railroad Company, is a common carrier as aforesaid, of passengers and freight of all kinds and descriptions, and by the Constitution and laws of the United States, and particularly by the "act" of the Congress of the United States approved February 4, 1887, and known as the "Act to regulate commerce," and especially the 3d section thereof, it is made unlawful for any interstate common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatever, or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever, and such carrier is required to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

7. Plaintiff says the Louisville and Nashville Railroad Company has announced its intention and purpose to refuse to receive, bill, transport, transfer, switch or deliver any live stock—the shipment of which originates outside of the State of Kentucky—con-
6 signed or tendered to be consigned to any point of physical connection between the said line and the line of the Southern

Railway Company in Kentucky, destined to the Central Stock Yards station, Ky., or to the Central stock yards, Kentucky, or any such live stock consigned to any individual, partnership, firm or corporation at said Central stock yards, Ky., or at said Central Stock Yards station, Ky., or via the Southern Railway Company in Kentucky, destined to said yard or station—and that it has so instructed its agents and employés all along its lines; and that in accordance with said announced intention and purpose and instructions given, it has for the last two months failed and refused, and now fails and refuses to receive, bill, transport, transfer, switch or deliver any such stock as consigned or tendered to be so consigned for shipment, although during said time, from day to day, live-stock shipments originating out of the State of Kentucky have been tendered defendant from connecting lines and other common carriers and shippers consigned to said Central stock yards, Ky., and to said Central Stock Yards —, Ky., and to individuals, firms, partnerships and corporations at said Central stock yards, Ky., and at said Central Stock Yards —, Ky., and to said stock yards and station via the Southern Railway Company in Kentucky.

8. Plaintiff further says that as to such interstate shipments so tendered or consigned, defendant has continuously failed and refused to receive, bill, transport, transfer, switch or deliver same to said Southern Railway Company in Kentucky, for delivery at said Central stock yards or station, but on the contrary, against the known wishes and requests of the consignors, has billed all live stock so tendered or consigned, to Louisville, Ky., and delivered same at the Bourbon stock yards in Louisville, Ky., and has failed and refused to permit the consignor and consignee conjointly to change the destination of such shipments, when they reached the break-up yards of defendant in South Louisville, Ky., and have same switched and transferred to the Southern Railway Company in Kentucky, for delivery at Central stock yards, Central Stock Yards station, Ky., although so requested—where defendant knew the consignees were, and both consignor and consignee desired the delivery made, although to have thus changed the destination would have been less inconvenient or burdensome to defendant, than to have taken said shipments from its break-up yards to the Bourbon stock
7 yards, which would make a difference in the haul of some five or six miles, and for which defendant would not receive any additional pay or compensation.

Plaintiff further states that on December 21, 1901, at Columbia, Tennessee, a regularly established station on the Louisville & Nashville Railroad Co., Allen Bros., customers of Hart, McCampbell & Co., commission merchants and brokers doing business at the Central stock yards with offices located at said yards, tendered to the agents and employés of the Louisville and Nashville Railroad Company at said station at Columbia, Tenn., a car-load of cattle which were loaded in Louisville & Nashville, car 18726, and billed to Allen Bros., Louisville, Ky., care of Hart, McCampbell & Co., Louisville, Ky.; that before receiving and billing said car-load of stock, said Allen Bros., demanded of the Louisville & Nashville Railroad Com-

pany, that said company receive, bill, transport, transfer, switch and deliver the said car-load of cattle to the Southern Railway Company, at Louisville, Ky., at one of the points of physical connection between the tracks of the Southern Railway Company and the tracks of the defendant, The Louisville and Nashville Railroad Company, for delivery by the Southern Railway Company at Central stock yards, Central Stock Yards station, Ky., care of Hart, McCampbell & Co., but the defendant The Louisville & Nashville Railroad Co., neglected, failed and refused to so bill the said stock and would not bill same otherwise than as stated, that is, to the said Allen Bros., care of Hart, McCampbell & Co., Louisville, Ky.

Plaintiff further says that said Allen Bros., immediately upon receiving the bill of lading for said car, forwarded same to said Hart, McCampbell & Co., and wired them requesting them to demand that said car-load of cattle should be stopped and unloaded at the Central stock yards, Central Stock Yards station, Kentucky.

Plaintiff further says that upon receipt of said telegram, and acting upon the instructions of the consignor, said Hart-McCampbell & Co., consignees did on the 22d day of December, 1901, before said car reached South Louisville, the break-up yards of the Louisville & Nashville Railroad Company, give written notice and requested of the agent, one J. F. Coady, the agent at said place, of the Louisville & Nashville Railroad Company, to change the destination of said car from Allen Bros., Louisville, Ky., care of Hart-Mc-
8 Campbell & Co., to Central stock yards, Central Stock Yards station, Ky., via the Southern Railway Co., Louisville, Ky., but that said agent refused to change the destination of said car as requested, and announced his purpose to, and thereafter did make delivery of the said car-load of cattle at the Bourbon stock yards, and informed plaintiff that the Louisville and Nashville Railroad Company had directed him that any and all live stock that should arrive at South Louisville over the lines of the Louisville & Nashville Railroad Company, and billed to any person at Louisville, Ky., would only be delivered at the Bourbon stock yards, and that the said defendant would refuse to recognize the right or rights of any shipper, owner or consignee of live stock to direct any change in its destination, that is as to all stock, the shipment of which originated outside of the State of Kentucky.

9. Plaintiff further says that on the 20th day of September, 1888, a contract was entered into between the Louisville and Nashville Railroad Company, first party, and the Bourbon Stock Yards Co., second party, and that by the fourth section of said contract, said parties agreed and contracted with each other as follows:

"4. First party agrees that it will not lease, rent or sell any of its ground in the city of Louisville, for the establishment of a stock yard or otherwise facilitate the establishment of a stock yard in the said city, and it will establish no other stock depot in said city, and that it will deliver and cause to be delivered to the second party, so far as it legally may, all live stock shipped over the roads of the first party and consigned to the city of Louisville, and should any live stock be shipped to other person or persons in said city, the

first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city, and agrees to unload all live stock shipped to said city at the address of the second party, but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court, or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions, and the second party shall at its own cost and expense defend any and all litigation which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom."

Plaintiff says that in order to carry out said contract or its part, the Louisville & Nashville Railroad Company has ever since
9 the Central Stock Yards Company began operation, continuously and persistently done everything in its power to divert the shipment of stock from said Central Stock Yards Co., and has continuously and persistently refused to receive, bill, transport, transfer, switch, or deliver either intra or inter state stock coming over its lines consigned to the Central stock yards, Ky., or Central Stock Yards station, Ky., or to any individual, firm or corporation at said yards or station, to the Southern Railway Company in Kentucky, for delivery at said yards or station, and that it only began to deliver such intrastate stock after an injunction had been obtained in the State court requiring it to do so, but that as to the interstate stock it still refuses to receive, bill, transport, transfer, switch or deliver same as stated; that said action on the part of the defendant, The Louisville and Nashville Railroad Company, is unlawful and makes and gives an undue and unreasonable preference and advantage to the Bourbon Stock Yards Company over the Central Stock Yards Company, and is an undue and unreasonable prejudice and disadvantage to the said Central stock yards, and that said action on the part of the defendant, The Louisville and Nashville Railroad Company is had and done for said purpose, and in order to break down the said Central Stock Yards Company, and to build up and sustain the said Bourbon Stock Yards Company and for this reason alone.

Plaintiff further says that the unlawful and unauthorized refusal of defendant to receive, bill, transport, transfer, switch and deliver said live stock so tendered or consigned, has greatly damaged the plaintiff, and is a violation of the Constitution and laws of the United States, and especially the act to regulate commerce passed by the Congress of the United States, and approved February 4, 1887, and amendments thereto, and that all of said action on the part of said defendant, The Louisville and Nashville Railroad Company, is an unjust, unauthorized and unlawful discrimination against this plaintiff, and unless restrained and prevented, and unless defendant is required to receive, bill, transport, transfer, switch and make delivery of said live stock as ordered by the consignor, or as, after shipment, ordered by the consignor or consignee, or owners, great and irreparable injury and damage will result to plaintiff and its stock yard.

10. Plaintiff says that it has invested in its plant about $200,000 and has connected therewith a number of leading commission
10 houses most of whom have their offices at said plant, and are engaged in selling and purchasing, from day to day, live

stock at said yards, and that a large number of customers throughout the State of Tennessee and elsewhere have expressed the purpose of doing business at said yards with said commission merchants, and have endeavored to have their stock consigned to said merchants and the plaintiff, and consigned to themselves at said yards for sale by such commission houses, and for care and attention and feeding by plaintiff, but that they have been prevented from doing so by the wrongful and unlawful failure and refusal of defendant, The Louisville and Nashville Railroad Company, to receive, bill, transport, transfer, switch and deliver same when said stock is so tendered, and they are requested so to do and that said defendant still refuses and fails to handle said stock otherwise than as stated hereinbefore.

Plaintiff further says that the railway system of the defendant, The Louisville and Nashville Railroad Company, extends through and over a large portion of the cattle and live-stock raising sections of Tennessee, and of several other Southern States, and that in order to reach the Central stock yards, one of the natural markets for said stock, it must necessarily pass over the lines of said defendant's road, and that by reason of the wrongful and unlawful action of the said Louisville and Nashville Railroad Company, and by reason of the discrimination against plaintiff as aforesaid all of said shippers, customers and patrons of plaintiff and of the numerous commission merchants doing business at said Central stock yards, are required and compelled by the Louisville and Nashville Railroad Company, to consign their said stock as directed by the said Louisville & Nashville Railroad Company, and to have same delivered at a stock yard other than that of plaintiff and other than the one at which such consignors and shippers desire said stock to be delivered; that is, at the Bourbon Stock Yards Company, Kentucky; and that such arbitrary, unlawful and oppressive conduct and discrimination on the part of defendant against plaintiff and the shippers and dealers in live stock along its lines, and the announced purpose and expressed intention of defendant by written as well as verbal instructions to its agents, and by its conduct as aforesaid, and by its declared intention, to plaintiff, to continue to so fail, neglect and refuse to receive, bill,
transport, transfer, switch or deliver such interstate live stock
11 destined to the Central stock yards, or to deliver same to the
Southern railway at any of the points of physical connection, to be delivered by it at the Central stock yards, or at Central Stock Yards station, unless immediately restrained and prevented, will cause great and irreparable injury and damage to plaintiff and its business, resulting in its disruption and destruction.

Plaintiff says that next Monday, the 13th day of January, is its regular sale day, and in fact, the principal sale day of the week, and that most of the dealers in live stock throughout the country at large, make shipments of such stock along the lines of road over which it comes so that it may arrive at the stock yards on Saturday or Sunday preceding the principal sale day on Monday, and that plaintiff has received notice and knows of a number of interstate shipments that will arrive over the lines of the Louisville and Nashville railroad between now and Monday morning, and which

are desired by the shippers to be delivered to the Central Stock Yards station, and that unless an immediate restraining order and mandatory order of injunction be granted herein without notice, requiring and compelling said defendant to so receive, bill, transport, transfer, switch and deliver to such interstate stock destined to the Central stock yards or said station, great and irreparable injury will be done plaintiff in its business.

11. Plaintiff says it has no adequate or ample remedy at law for the injury to its business inflicted as aforesaid, and threatened and complained of as hereinbefore alleged, and that if required to institute an action for damages upon each and every refusal of the defendant to receive, bill, transport, transfer, switch or deliver such interstate live stock, great delay will be occasioned to the shippers and dealers in live stock and the plaintiff in receiving the same for sale and by the failure of plaintiff to receive the said live stock for care and attention and feeding thereof, great damage will be done to plaintiff, and suffering inflicted upon said stock, and the business of plaintiff will be disrupted and totally ruined, and separate and distinct actions will be wholly inadequate to the injury so inflicted.

Plaintiff further says that the said failure and refusal of defendant as aforesaid to receive, bill, transport, transfer, switch or deliver the said stock has resulted in great and irreparable injury to plaintiff's business, and that it has been damaged thereby in the sum of at least three thousand dollars ($3000.00), and if defendant car-
12 ries out its announced purpose and expressed intention to continue in such refusal, plaintiff will be damaged in the sum of at least fifty thousand dollars ($50,000).

12. Plaintiff further states that the injunction herein sought and prayed for has never been refused by this court, or by any judge of this court, or any circuit or district judge or justice of this court.

Wherefore, the plaintiff prays that the defendant, The Louisville and Nashville Railroad Company, be, by mandatory order of injunction, immediately ordered and required to receive, bill, transport, transfer, switch and deliver any and all shipments of live stock tendered to it outside of the State of Kentucky, consigned or tendered to be consigned to any point of physical connection between its said line and the line of the Southern Railway Company in Kentucky, destined to the Central Stock Yards station, Ky., or to the Central stock yards, Ky., or any such live stock consigned to any individual, partnership, firm or corporation at said Central stock yards, Ky., or at said Central Stock Yards station, Ky., or via the Southern Railway Company in Kentucky, destined to said yards or station, and that it also be required, whenever so requested by the consignor and consignee or owner of said stock, at any of its stations, to recognize the right of said parties to change the destination of said shipment; and that it be required to change said destination and make delivery thereof at any one of the points of physical connection between the tracks of said defendant's line and the tracks of the Southern Railway Company in Kentucky, for delivery by the said Southern Railway Company at the Central Stock Yards station, Ky., or to whomsoever there consigned; and further prays that until

notice is given and hearing had upon the application for an injunction, *that* this honorable court grant unto plaintiff a restraining order as herein prayed, and to be effective until this honorable court can make decision upon the said motion for an injunction, and plaintiff prays for a judgment herein against the defendant for the sum of three thousand dollars ($3000), and upon final hearing, for a perpetual injunction as prayed herein, and for all such other necessary and proper relief, the premises considered.

May it please your honors to grant unto plaintiff a writ of subpœna to be issued from the clerk's office of this court, directed to the said Louisville and Nashville Railroad Co., and commanding it to appear herein upon a day named therein, and full and true
13 answer make to complainant's bill, but not under oath, answer under oath being waived, and your complainant will forever pray.

DODD & DODD,
W. M. SMITH,
Att'ys for Plaintiff.

UNITED STATES OF AMERICA, }
Western District of Kentucky, } *sct:*

On this the 11th day of January, 1902, before me, personally appeared B. H. Hurt, who says that he is the chief officer and president of the plaintiff, The Central Stock Yards Company, and made solemn oath that he had read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

B. H. HURT.

Subscribed and sworn to before me by B. H. Hurt, this 11th day of January, 1902.

HENRY F. CASSIN,
U. S. Com'r.

And on another day of said term of said court, to wit, on the 13th day of January, 1902, came The Central Stock Yards Company, by counsel, and moves the court upon its verified petition herein, that this honorable court issue against the defendant, Louisville & Nashville Railroad Company, a mandatory order of injunction ordering and directing the said defendant, Louisville & Nashville Railroad Company, to receive, when tendered to it by any owner or consignor, or connecting common carrier, any and all live stock and to immediately bill, transport, transfer, switch and deliver the same as so ordered by such owner or consignor of any live stock to any point of physical connection between the tracks of the said Louisville & Nashville Railroad Company and the tracks of the Southern Railway Company in Kentucky at Louisville, Kentucky, for delivery by said Southern Railway Company to Central stock yards, Central stock yards, Kentucky, or any individual, partnership, firm or cor-

poration at said Central stock yards, Central stock yards, Kentucky, as ordered by such owner or shipper, and that whenever so requested by the consignor, consignee or owner of any live stock at any of its established stations that said defendant, Louisville
14 & Nashville Railroad Company, be ordered and directed to recognize the right of said consignor, consignee or owner to change the destination of such shipment of live stock to Central stock yards, Central stock yards, Kentucky, or any person, firm partnership or corporation doing business thereat, upon the payment of the usual and customary freight charges on such consignment to Louisville, and that said defendant, Louisville & Nashville Railroad Company, be required to change the said destination when so requested and make immediate delivery thereof to the Southern Railway Company in Kentucky, and at one of the points of physical connection between the tracks of the said Southern Railway Company in Kentucky, at Louisville, Kentucky, and the tracks of the said defendant, Louisville & Nashville Railroad Company, for delivery by the said Southern Railway Company to Central stock yards, at Central stock yards, Kentucky, or to whomsoever there consigned.

It is ordered that said motion be set for hearing January 15th, 1902.

And on another day of said term of said court, to wit, on the 15th day of January, 1902, came the parties by their counsel. The complainant, by leave of court, filed an amended bill herein. Came the defendant, by counsel, and filed the affidavit of Walker D. Hines and one exhibit, and by consent of parties it is ordered that the complainant's motion for a temporary injunction herein be set for hearing January 17, 1902.

The amended bill above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Bill.

And now comes the plaintiff, and with leave of the court first had and obtained, amends its bill of complaint herein as follows:
15 1. Your orator, The Central Stock Yards Company, respectfully represents to this honorable court that since the enactment by the Congress of the United States of the act known as "An act to regulate commerce," passed February 4th, 1887, and amendments thereto, the Commonwealth of Kentucky has, by constitutional provisions and legislative enactments, in aid of commerce, imposed certain duties upon all common carriers, and that by mandatory self-executing constitutional requirements of the Commonwealth of Kentucky all railroad companies organized under the

laws of Kentucky, or operating, maintaining or controlling any railroad, or doing a railroad business in this State, are required to receive, transfer, deliver and switch empty or loaded cars, and to move, transport, receive, load or unload all freight in car-loads or less quantities coming to or going from any railroad, transfer, belt line, bridge or siding thereon with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback, or rebate in favor of any person, corporation, consignee or consignor in any matter as to *payment, transportation, handling or delivery*, and that all railroad companies doing business in this State shall so receive, deliver, transfer and transport all freight from and to any point where there is a physical connection between the tracks of said companies; and further, under the constitution and laws of the State of Kentucky, it is made unlawful for any railway, transfer, belt line or railway bridge company to make any exclusive or preferential contract or arrangement with any individual, association or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier, and that the acts and conduct of the defendant complained of in its original bill are in violation of the constitution and laws of the State of Kentucky, and it pleads and relies thereon in aid of the act of Congress of the United States, and known as "An act to regulate commerce."

Wherefore, the plaintiff prays as in its original bill, and for all such other necessary and proper relief the premises considered.

DODD & DODD,
W. M. SMITH,
Attorneys for Plaintiff.

16 The affidavit of Walker D. Hines, above referred to, is as follows:

United States Circuit Court, Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Walker D. Hines, being duly sworn, says: I am the first vice-president of The Louisville & Nashville Railroad Company, defendant in the above-styled action.

I file herewith as a part hereof a true and complete copy of the contract between the Louisville & Nashville Railroad Company and the Bourbon Stock Yards Company, which is referred to, and a part of which is quoted, in the bill of complaint in the above-entitled cause.

The facts as to that contract, and the consideration leading to its execution and observance are as follows:

At a place, such as the city of Louisville, it is absolutely essential to the proper management and handling of business that a railroad company handling a large amount of live stock, either bringing it to the Louisville market or taking it from that market, should have

a regular live-stock depot provided with facilities for handling and taking care of that peculiar species of property. Live stock need peculiar attention. They suffer from heat and cold and from hunger and thirst. They have to be fed and watered at regular intervals to keep them from suffering and to preserve them in good condition. They are liable, when large numbers of them are placed in cars, as it a necessity, to get down and be trampled upon, a liability which, of course, increases the longer they stay confined in one car or other place. *Moreover, certain kinds of live stock suffer* very greatly from extreme heat or extreme cold. In very hot weather it is of the greatest importance in handling such live stock to unload them from cars as quickly as possible and throw water upon them in order to reduce their bodily heat. The longer they stay in cars in which they have been transported the more liable do they become to injury from any of the causes above mentioned. In other words, when such stock reaches its destination, it is essential that it be delivered and unloaded not only carefully, but
17 quickly, in order to prevent injury and distress.

In the respects aforesaid live stock differs very essentially from dead freight as to the manner in which it is required to be handled. Dead freight, except that special class known as perishable freight, can ordinarily stand loaded in a car on a side track for hours at a time without injury or impairment, awaiting a time when it can be conveniently handled and delivered without interfering with or endangering the handling of other traffic by the railroad company having charge of the same. While, therefore, special deliveries of dead freight at different side tracks in the city of Louisville may often be made without inconvenience to any one, yet it would be a very great inconvenience for a railroad company handling live stock to be compelled to make special deliveries of live stock, in such manner as it is essential to make it if made at all.

Owing to considerations of the kind heretofore stated the Louisville & Nashville Railroad Company many years ago made the contract above mentioned, and has always insisted upon making deliveries of live stock for the Louisville market only at its live-stock depot, established by that contract, and that is what it is doing today; and it is its refusal to depart from that custom, and to violate the provisions of that contract, which has given rise to this present suit. Defendant has not in any way discriminated against the complainant, The Central Stock Yards Company. It has always refused, and now refuses, to deliver live stock destined for the Louisville market, whether consigned to complainant or to any other person natural or artificial, at any other place than at the live-stock depot of defendant as established by the aforesaid contract. It has steadfastly refused to make special deliveries of live stock destined for the Louisville market, at any switch or siding for any person. And its right to make such contracts and to perform them have been upheld both by the Supreme Court of the United States (Covington Stock Yards Co. *v.* Keith, 139 U. S.) and by the United States circuit court of appeals (Butchers', &c., Stock Yards Co. *vs.* L. & N. R. Co., 67 Fed. Rep.).

The effect of said contract is simply that the Louisville & Nashville Railroad Company establishes its live-stock depot at the Bourbon stock yards and agrees not to receive or deliver live stock for the Louisville market at any other place. It is true that the stock yards of the complainant are just a few feet outside of the limits of
18 the city of Louisville, but to all intents and purposes it is the same as if it were situated within the city limits. It is intended as a stock yards for the Louisville market, and is operated as such. *It is also true technically that the complainant*, The Central Stock Yards Company, is not demanding a technical delivery at its yards by the Louisville & Nashville Railroad Company, because the said Central stock yards are not located on a track of the Louisville & Nashville Railroad Company, but the complainant is demanding that the Louisville & Nashville Railroad Company when its cars containing live stock for the Louisville market reach the city of Louisville, it shall switch such cars out of the regular course which would take them to defendant's live-stock depot, and carry them to a side track making connection with the Southern railway, and there make a delivery of them to the Southern railway, to be thence carried a short distance by the Southern railway, to the Central stock yards. This, of course, would be just as inconvenient and as burdensome to the Louisville and Nashville Railroad Company as a special delivery upon the side track of some individual would be. For in practical operation it makes no difference whether the special delivery by the Louisville & Nashville Railroad Company be on a side track connecting with some industry, or on a side track connecting with some other railroad. The purpose of establishing its live-stock depot was that it might make all deliveries of live stock for the Louisville market at that place, and that it should not be compelled to make deliveries of live stock for the Louisville market either at the private siding of some individual or at the siding connecting it with some other railroad which might in turn make a delivery to the individual.

The facilities provided for the handling of live stock at defendant's live-stock depot at the Bourbon stock yards are very commodious, and are amply sufficient for the proper handling of all live stock which comes to the Louisville market. Under the contract heretofore mentioned there has been provided and maintained an ample force of men skilled in the handling of live stock; and such live stock have been under the operations of said contract, carefully and skillfully and promptly handled. Moreover, there is no charge made against the shipper or owner of the stock for the loading and unloading of his stock at the said Bourbon stock yards, or for keeping the same until the owner thereof shall have had a reasonable opportunity to receive it and dispose of it as he sees fit. He may,
19 if he chooses, leave the said live stock with the Bourbon stock yards to be further kept and handled for him; but this is entirely a matter of option with him. He can leave it or he can take it away, as he pleases. If he does choose to leave his live stock with the Bourbon stock yards for handling, then under the aforesaid

contract the said Bourbon stock yards has bound itself to make its charges to him reasonable.

On the faith of the said contract both the Louisville & Nashville Railroad Company and the Bourbon Stock Yards Company have expended large sums of money in providing ample facilities for the handling of live stock at the said depot, including the building of many side tracks, the erection of sheds, the construction of pens and chutes, and the establishment of quarantine pens in which cattle coming from certain territory liable to infection, can be kept separate from others in accordance with the regulations of the United States on that subject; all of which has been done under the belief on the part of both of said companies that the contract was a valid contract.

I also desire to say, and do say, that before the erection of any of the structures of the Central Stock Yards Company by Mr. B. H. Hurt, who is the president of that company, and was its chief promoter, came to the president of the Louisville & Nashville Railroad Company *as* asked if arrangements could be made for the receipt and delivery by the Louisville & Nashville Railroad Company of live stock at said stock yards, to be located where the present stock yards of the Central Stock Yards Company are erected; and the president of the Louisville & Nashville Railroad Company told him at that time, before any of the works or buildings of the said company had been erected, that the Louisville & Nashville Railroad Company would not and could not receive or deliver live stock at that place, or at any other place than its regular live-stock depot at the Bourbon stock yards, because it had entered into a contract with the Bourbon Stock Yards Company, which was still in effect, and was believed to be a valid and just contract, under which the Louisville & Nashville Railroad Company could not and would not receive and deliver live stock at any other place than at the Bourbon stock yards. Mr. Hurt then called attention to the fact that the Central stock yards were not to be within the limits of the city of Louisville, but the president of the Louisville & Nashville Railroad Company said to him that it was manifestly intended as a stock yards for the Louisville and was within the meaning and spirit of the contract between the Bourbon stock yards and the Louisville & Nashville Railroad Company as much as if it were actually within the limits of the said city.

As to the three alleged connections between the tracks of the Louisville & Nashville Railroad Company and the tracks of the Southern Railway Company referred to in the bill of complaint the facts are as follows:

As to what is referred to in the bill as the Bergen & Meehan switch this is a mere private side track which belongs to a private individual, not to the Louisville & Nashville Railroad Company, and is not open to general use by the Louisville & Nashville Railroad Company.

As to what is referred to in the bill as the Fourth Avenue connection, it is true that there is a connection at this point between the tracks of the Louisville & Nashville Railroad Company and those

of the Southern railway, but that place is one wholly unfit for the regular transfer of live stock from one of said railroad companies to the other. This is a point where the main tracks of the Louisville & Nashville Railroad Company and the tracks of the Louisville Railway Company (an electric street-car line) all cross each other. And but a few feet east of this point of crossing is a public street paved with asphalt, whereas just a few feet west of this point of crossing is a passenger station on the line of the Southern railway, at which many passengers get on and off the passenger cars of the Southern railway. Thus passengers who get off of such cars come immediately across the said point of intersection of said tracks to a point where they can take the cars of the Louisville Railway Company to be brought into the city; while on the other hand, persons intending to leave the city from said passenger station go out on the Fourth Street cars of the Louisville Railway Company to the said point of crossing and there alight, walk over the crossing to the aforesaid passenger station of the Southern railway and there take its cars. Furthermore, there are no side tracks at the said crossing or intersection upon which cars can be set off by the Louisville and Nashville Railroad Company to await there being taken up by the Southern Railway Company or *vice versa*. And if an attempt should be made to exchange cars at that point it would be necessary to leave these cars either on the main tracks of the Louisville & Nashville railroad over which its regular passenger trains travel, or on the main track, which is a single track, of the Southern Railway Company over which its passenger trains regularly pass.

21 It would, therefore, be impracticable as well as dangerous, for the reasons heretofore mentioned, to attempt to make said Fourth and G Street crossing a regular place of interchange of live-stock cars between said two railroad companies.

The only other point of physical connection which has been alleged to exist between the tracks of the Louisville & Nashville Railroad Company and those of the Southern Railway Company is at Seventh and Magnolia streets. This point is about two miles north of south Louisville and the south Louisville yards referred to in the bill of complaint, and is about one and one-half miles south of defendant's station at Tenth and Broadway. To reach this point of connection, to wit: at Seventh and Magnolia avenue, it would be necessary to have a switch-engine and crew take the live-stock cars destined for the Central stock yards and carry them northwardly about two miles over the defendant's tracks running from south Louisville to its aforesaid station at Tenth and Broadway, which is entirely out of the course by which live-stock cars travel from south Louisville to defendant's live-stock depot at the Bourbon stock yards. In other words, to reach the said Seventh and Magnolia Avenue crossing it is necessary to use about two miles of defendant's terminal tracks reaching its main passenger station and one of its main freight yards, which tracks are not used in the conduct of its live-stock business where the stock is delivered at its regular live-stock depot, at the Bourbon stock yards. These tracks reaching from south Louisville to its aforesaid depot

and yards near Tenth and Broadway are very greatly crowded with business, even as that business is now conducted. As it is now, there is so much traffic over the said tracks between south Louisville and the yards near Tenth and Broadway, that the switch-engine plying between those two points does not and cannot make special deliveries at side tracks along the way, but carries cars, without stopping, from south Louisville northwardly to the yards near Tenth and Broadway, from which last-mentioned yards special deliveries are made at individual sidings by another switch-engine and crew where such special deliveries are made at all. But this method of doing business would necessitate too much delay for the proper handling of live stock for reasons heretofore explained, and to compel defendant to handle live stock over those tracks, and make deliveries of live stock for the Central stock yards to the Southern railway at Seventh and Magnolia, if there is any considerable amount of said business, as complainant anticipates,
22 would be a very great burden upon defendant and a great interruption of its business.

Moreover the effect of the order or decree sought by complainant would be to require defendant to establish against its will a new through route for the transportation of cattle from points on its own line to the Central stock yards, a point on the Southern railway, and to deliver freight to the Southern railway without the prepayment of freight charges, whereas I submit that none of these things are required by, but are inconsistent with the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and the amendments thereto, which the defendant has understood to be the exclusive law and regulation by which it was to be governed in handling continuous shipments from a point in one State to a point in another State.

Furthermore, the effect of the order or decree sought by complainant would be to compel defendant against its will to make exchange of traffic with the Southern railway at Louisville, Ky., so as to effect the continuous carriage or shipment from a point in another State to a point in Kentucky on the line of said Southern railway, and in order to effect this defendant would be required practically to afford to the Southern railway the use of defendant's terminal facilities and tracks, something again which is inconsistent with the said act to regulate commerce and the amendments thereto.

WALKER D. HINES.

Subscribed and sworn to before me by Walker D. Hines, this 14th day of January, 1902. My commission expires at the end of the present session of the senate.

HUSTON QUIN,
N. P. J. C., Ky.

The Exhibit "Contract" above referred to is as follows:

This agreement made and entered into this 20th day of September, 1888, by and between the Louisville & Nashville Railroad Company, first party, and the Bourbon Stock Yard Company, second party.

Witnesseth, that whereas the second party is the co-owner and lessee of two stock yards, one situated in the vicinity of Fourteenth and Kentucky streets, and the other at the head of Market street, both in the city of Louisville, and contiguous to the railroad lines of the first party,

23 And whereas, on the 8th day of October, 1880, the parties hereto entered into an agreement running for ten years from that date, under which the first party undertook to deliver so far as it legally could, to the second party, all live stock shipped over the first party's lines and consigned to the city of Louisville, the second party agreeing to receive, unload, care for and deliver same; also to load live stock shipped over the first party's lines and consigned to the city of Louisville, the second party to receive, unload, care for and deliver same; also to load live stock for shipment and to charge not more than eighty cents per car for loading and unloading such live stock.

And whereas, on the nineteenth day of March, 1881, second party made a similar contract, running for ten years from that date with the Louisville, Cincinnati and Lexington Railroad Company, whereby similar agreements and services were to be performed at the second party's stock yards, at the intersection of Market street with the L., C. & L. railway, the second party to charge not more than sixty cents per car-load for loading or unloading live stock at said Market Street yard. The first party to this agreement having since acquired the property of the Louisville, Cincinnati & Lexington R'y Co., succeeds to the obligations and privileges of that company under said contract.

And whereas, the second party desires to make certain important additions and improvements to its stock yards and their equipment, also to build pens with a view to establishing a mile market adjacent to its present yards. And, therefore, desires to have the above-mentioned contracts extended so as to justify it in making the necessary expenditures to effect these improvements.

And whereas, other stock yards have been located in the vicinity of Twenty-eighth and Broadway streets in said city, in competition to the yards of the second party and being so located as to be inaccessible to business passing from or to the lines of the first party; and that if the efforts now being made to establish business at these last-mentioned yards should be successful, it would tend to divert business from the lines of the first par*ties*, especially its lines between Louisville, Cincinnati and Lexington, as stock shipped from those yards would naturally pass over the Kentucky and Indiana bridge, placing the first party at a disadvantage in competition for the transportation of such stock.

24 And whereas, the second party is willing to make a lower charge for loading and unloading of live stock than is stipulated for in either of the present contracts above mentioned.

It is, therefore, agreed that for and in consideration of the premises and of the mutual covenants, stipulations and promises hereinafter set forth, and the profits to be derived therefrom, the parties hereto agree as follows:

1st. The second party agrees to maintain and keep in good order the two stock yards above mentioned, each of sufficient capacity and with suitable accommodations for the carrying out of this contract; and at the Market Street yards to make the necessary additions to the said premises and to build additional pens for the handling of mules, and will facilitate the establishing of a mule market at the said yard in addition to the facilities at present existing.

2nd. Both of the said stock yards to be always properly equipped with suitable fencing, feeding pens and other conveniences for the proper care and handling of live stock, such as are usual and customary in the best-conducted stock yards in this country.

The second party further agrees to keep at the said stock yard a sufficient number of skilled workmen to perform the services herein undertaken by it, and generally to do such work and labor as is generally provided in stock yards of the best class, and especially that said workmen shall be skilled and well qualified to load or unload any or all live stock which may be received or delivered by the first party at the said yards.

And the second party agrees and promises to load, unload and care for, at its own risk of damages, all live stock that may require such loading or unloading on cars at the said yards, and to charge therefor no more than is charges at the same time for similar services by the managers of other stock yards in said city, and in no event to charge more than fifty cents per car-load for loading or unloading. No charge is to be made for loading or unloading where the shipment consists of less than a car-load, as per waybill.

And the first party agrees to pay to the second party the charge not exceeding fifty cents per car, as above prescribed for each car-load of stock loaded or unloaded at said yards from or for the first party's railroad lines; and the second party agrees that all charges for keeping, feeding and caring for live stock coming to its yard under this contract directly or indirectly shall be reasonable; and said second party will not, without the consent of the proper officer of the first party, charge more for keeping, feeding and caring for the live stock of its patrons than is charged for similar services or supplies by other stock yards in said city. And the second party shall be responsible for all charges for stock delivered by said first party upon delivery to it by the first party and shall pay the same promptly to the first party in such manner, and at such times as may be directed by the traffic manager or gen'l freight ag't of the first party, and generally in all matters relating to the shipment and delivery of the stock at said stock yards, the second party is to act as the agent of the shipper or consignees respectively, and to answer for and be responsible to them for the proper conduct and management of all such matters.

3rd. The first party agrees to maintain in good order and repair all necessary and proper switches and side tracks for the safe and convenient loading and unloading of live stock at the said yards, but all the necessary chutes, platforms, pens and appliances, necessary and proper (and of the best character) for the safe loading and

unloading of live stock at both the said yards shall be erected and maintained in good order and repaired by the second party, subject to the direction and requirements of the first party's general manager or superintendent, and the second party hereby assumes all risk and responsibility, for any damage or injury which may be sustained by stock received or delivered at either of said yards, and necessary changes, improvements or repairs required by the first party's general manager or superintendent shall be thoroughly and promptly made by and at the expense of the second party.

4th. The first party agrees that it will not lease, rent or sell any of its ground in the city of Louisville, for the establishment of a stock yard or otherwise facilitate the establishment of a stock yard in the said city, and it will establish no other stock depot in the said city, and that it will deliver and cause to be delivered to the second party, so far as it legally may, all live stock shipped over the roads of the first party, and consigned to the city of Louisville, and should any live stock be shipped to other person or persons in said city, the first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city and agrees to unload all live stock shipped to said city at the yard of
26 the second party, but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions, and the second party shall at its own cost and expense, defend any and all litigation which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom.

5th. It is agreed that the delivery of stock in cars upon the switches or sidings provided for the purpose at the stock yards of second party, shall be deemed a delivery to the second party, and thenceforward, the second party will be responsible to owners, consignors or shippers for the said stock.

6th. This contract is to take effect on October 1st, 1888, and remain in effect for ten years from its date, unless sooner terminated by operation of law or judgment of court.

7th. The contracts of October 8, 1880, and March 19, 1881, mentioned in the preamble of this agreement, are hereby abrogated and annulled, except for the settlement of any unpaid accounts for services rendered unto them, or any legal questions that might arise under or by the execution of this contract.

In testimony whereof, the parties hereto have caused these presents to be executed by their duly authorized officers and their corporate seals affixed on the day and year first above written.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

[SEAL.] By M. H. SMITH, *Vice-President.*

Attest: J. H. ELLIS, *Secretary.*

BOURBON STOCK YARD COMPANY,

[SEAL.] By J. G. BARRET, *President.*

Attest: CLIFTON RODES BARRET, *Secretary.*

It is agreed between the Louisville & Nashville Railroad Company and the Bourbon Stock Yard Company, parties to the within agreement, dated September 20th, 1888, that the same shall be extended for a term of ten years from the date of its expiration, that is, for a term of ten years from September 20, 1898, and each party in consideration of the undertaking of the other agrees to perform and abide by all the terms, stipulations and conditions of the within agreement, for the term of ten years from September 20th,
27 1898, just as if said agreement had originally provided that it should remain in effect for twenty years instead of ten years from its date.

In consideration of the premises, the Bourbon Stock Yards Company further agrees that it will, during the term of ten years for which the within agreement is hereby extended furnish, through its own meter and at its own expense all water necessary in any way for the maintenance or operation of the stock yards named in the within agreements or necessary for the performance of its obligations under the within agreement, *are* necessary for the performance of its obligations under the within agreement as hereby extended, instead *of* heretofore, of using water through the meter of, and at the expense of the Louisville & Nashville Railroad Company.

In witness whereof, said Louisville and Nashville Railroad Company and Bourbon Stock Yards Company hereunto subscribe their names and affix their corporate seals this the 12th day of July 1897.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

[SEAL.] By N. H. SMITH, *President.*

Attest: J. H. ELLIS, *Secretary.*

BOURBON STOCK YARD COMPANY,

[SEAL.] By H. R. RAY, *President.*

Attest: GEORGE T. WOOD, *Secretary.*

And on another day of said term of said court, to wit, on the 17th day of Jan., 1902, came the parties by their counsel. The complainant by counsel filed the affidavits of W. A. Evans, S. A. Stalcup, T. C. Powell, J. W. Byrne, J. E. Miller, R. C. Watkins, and B. H. Hurt, herein.

The defendant also filed its answer and the affidavits of Walker D. Hines (2), M. H. Smith and M. J. Reedy herein.

The complainant's motion for a temporary injunction coming on to be heard, was argued by counsel, in part and there not being time to conclude same today, time is given until tomorrow.

28 The affidavit of W. A. Evans, above referred to, is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Affidavit of W. A. Evans.

W. A. Evans, being duly sworn, says that he was in the service of the Bourbon stock yards in Louisville, Kentucky, about 22 years and occupied different positions during such service, including that of yardmaster, and he further says that no live stock coming to Louisville to the Louisville market, could or can get to the said Bourbon stock yards other than over the tracks and line of railway of the Louisville & Nashville Railroad Company, and that during his service there was much complaint of the delay on the part of shippers in having deliveries made of their stock at said Bourbon stock yards; that he has examined the plant and equipment of the Central stock yards and believes the facilities for loading and unloading live stock with safety and promptness possessed by the said Central stock yards are of the most modern character, and equal to those possessed by any stock yards within his knowledge.

He further knows personally R. M. Wayhen, weigher at the Central stock yards, Andrew Graves, E. Brewer, Harry O'Brien, David Crady, Sam. Moore, F. Dupen, and William M. Hicks, all of whom are in the employ of the Central stock yards, and that the said last seven named are skilled workmen in the performance of the services necessary to the speedy and safe loading and unloading, giving attention to and caring for, and handling live stock from having served with them and observed their skill and ability in said line, and considers said corps of workmen so employed at Central stock yards to render such service of the best to be had.

He further says that he knows the location of the break-up yards of the Louisville & Nashville Railroad Company in South Louisville and the position of the side yards with respect to the
29 location of the Central Stock Yards plant, and that the said Central Stock Yards plant is only a few hundred yards eastwardly of said break-up yards, and much nearer than the plant of the Bourbon Stock Yards Company, and that of the live stock coming to the Louisville market over the Louisville & Nashville railroad he believes that about 80 or 85 per cent. comes from the South and is broken up in the yards of the Louisville & Nashville Railroad Company in South Louisville and that if handled in making delivery thereof, at the said Central stock yards as said stock is handled for the Bourbon stock yards, by the said Louisville & Nashville Railroad Company, a distance in transportation of about five miles would be saved in making delivery at the said Central stock yards.

Affiant further says that he is not now in the employ of the Bourbon stock yards or any stock yards, but has been assistant postmas-

ter for a period of over two years, and still occupies the same position.

[SEAL.] W. A. EVANS.

Subscribed and sworn to before me, by W. A. Evans, this 17th day of January, 1902. My commission expires February 2, 1902.

MARY M EWING,
N. P., J. Co., Ky.

The affidavit of S. A. Stalcup, above referred to, is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Affidavit of S. A. Stalcup.

The affiant, S. A. Stalcup, says that he is the trainmaster of the Southern Railway Co. in Kentucky, and as such is charged with the duty of looking after and supervising the movements of trains and cars over the lines and terminals of the Southern Railway Company in Kentucky, at Louisville, or what is known as the Louisville division of said railway system.

Affiant further states that it is the custom and daily practice of the Southern Railway Company, in Kentucky, at Louisville, to deliver to the Louisville & Nashville Railroad Company at its connections with said railway system loaded cars of the said Southern Railway Company for points on the line of the Louisville & Nashville Railroad Company; and that it constantly delivers live stock loaded at points on its lines in Southern Railway Company's cars and destined to the Bourbon stock yards at Louisville, Ky., located on the Louisville & Nashville Company's tracks, which said cars are transported, transferred and delivered to said Bourbon stock yards by the Louisville & Nashville Railroad Company; and that constantly carload lots of live stock originating at the Bourbon stock yards are transported, transferred, switched and delivered at the points of physical connection between the said Southern Railway Company in Kentucky and the Louisville & Nashville Railroad Company, destined to other points in and out of Kentucky.

The affiant further states that the point of physical connection between the tracks in Louisville, Ky., of the Southern Railway Company in Kentucky, and the Louisville & Nashville Railroad Company, at 7th and Magnolia streets, is about a mile and a half from what is known as Central Stock Yards station, Kentucky, and that to receive, transport, transfer and deliver a car or cars of live stock at said point of physical connection from the Louisville & Nashville railroad, and the delivery thereof at Central Stock Yards station, Kentucky, and the return of the empty cars so received from

said Louisville & Nashville Railroad Company, at said point of connection, requires from an hour to not exceed two hours, and that on the 5th day of November, 1901, the said Louisville & Nashville Railroad Company did place upon the switch at the point of physical connection at 7th and Magnolia streets, Louisville, Kentucky, car-loads of live stock at 1.02 p. m., destined to Central Stock Yards station, Kentucky; that the same were removed by the said Southern Railway Company in Kentucky at 1.10 p. m., and delivered at Central Stock Yards station at 1.25 p. m., and thereafter the empties were returned to the said point of connection aforesaid, and delivered to the Louisville & Nashville Railroad Co. at 2.40 p. m., consuming an hour and thirty-eight minutes from the time of
31 delivery upon the switch of the Southern Railway Company in Kentucky, by the Louisville & Nashville Railroad Company, and the time of the redelivery of the empty cars to the Louisville & Nashville Railroad Company at said point.

Affiant further says that live stock originating at points on the line of the Southern Railway Company in Kentucky, is transported, transferred, switched and delivered without discrimination, whether the same is destined to the Bourbon stock yards, in Louisville, Ky., or the Central stock yards, at Central Stock Yards station, in Jefferson county, Kentucky.

Affiant further says that the trackage and switching facilities of the Southern Railway Company in Kentucky, at Louisville, are adequate and sufficient for the prompt transfer and delivery of any and all live stock that may be destined for any point on its line, including the Central Stock Yards station, Ky., and that after delivery by such connecting carrier of live stock or freight at such point of connection no further service is required by the carrier upon whose line such freight originated.

Affiant further states that if live stock destined to the Central stock yards, and reaching the break-up yards of the Louisville & Nashville Railroad Company, at South Louisville, is promptly handled as such character of freight should be, by the Louisville & Nashville Railroad Company, to the Southern Railway Company in Kentucky, at 7th and Magnolia Streets connection, that same can be delivered and in the course of business would be delivered in less time than is required for delivery of such character of freight from south Louisville to the Bourbon stock yards, as the distance from south Louisville to Central stock yards via the 7th and Magnolia Streets connection is about three miles, and the distance from south Louisville to the Bourbon stock yards is twice that distance or more.

S. A. STALCUP.

Subscribed and sworn to before me by S. A. Stalcup, this 15th day of January, 1902. My commission expires the 12 day of January, 1904.

[SEAL.] CHARLES JOHANBOEKE,
Notary Public, Jefferson County, Kentucky.

32 The affidavit of T. C. Powell, above referred to, is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMville, Defendant.

Affidavit of T. C. Powell.

The affiant, T. C. Powell says that he is assistant freight traffic manager of the Southern Railway Company, and the Southern Railway Company in Kentucky; that on October 5th, 1901, he, as assistant freight traffic manager of said railway, notified, by letter, Mr. D. M. Goodwyn, general freight agent of the Louisville & Nashville Railroad Company, at Louisville, Kentucky, as follows: "October 5th, 1901. 7753 A. Mr. D. M. Goodwyn, general freight agent, Louisville, Ky. Dear Sir—Rate adjustment. Rates on live stock to and from Central stock yards, Louisville, Ky. I beg to advise that we have just been officially notified that the Central Stock Yards Company, whose yards at south Louisville, have been selected as our live-stock depot in Louisville, will be ready for business November 1st, 1901, and the first sales day will be Monday, November 4th, 1901.

The Southern railway has arranged with the Central Stock Yards Company to perform switching between their yards and connecting points on other lines in Louisville, the tariff on stock to and from your line being as follows:

Between L. & N. railroad at Fourth avenue and Central Stock Yards Company, $1.00 per car. Between L. & N. railroad at 7th and Magnolia, and Central Stock Yards Company, $2.00 per car.

This charge covers cost of handling the loaded car in one direction and the return of the empty car in the reverse direction.

Please be advised that on and after November 1, 1901, we will receive from your line at either one of the above connecting points all live stock tendered us for delivery to the premises of the Central Stock Yards Company, and will be responsible for such de-
33 livery, and the collection of your charges on same in the usual way. Will you please advise all interested to the above effect. We shall be glad to have you indicate in your live-stock tariffs showing rates to and from Louisville, or by circular, that live stock may be handled to and from the Central Stock Yards Company in connection with the Southern railway."

Similar notices dated October 5th were sent to the freight traffic officers of the other lines connecting with the Southern Railway Company in Louisville.

Affiant further states that it is the universal custom between reputable and solvent railroad companies to make delivery of carload lots of freight of any and all kinds without exactly prepayment

of freight under notices of the character above set forth, where the receiving common carrier becomes responsible for such delivery and collection of all charges on same.

Affiant further states that he has since been advised that the Central Stock Yards Company is located at a point on the lines of the Southern Railway Company in Kentucky, in Jefferson county, and not in the city of Louisville. Affiant further says that he authorized the publication of circulars D. 3, dated October 31, signed jointly by Edwin Fitzgerald, assistant freight agent, Louisville division, and R. A. Campbell, assistant freight agent St. Louis division.

He further states that subsequent to his notice of October 5th, in regard to the switching to be performed to the Central Stock Yards Co.'s plant, acknowledgment- were received from the following: J. B. Hill, general freight agent, P. C. C. & St. L., under date of October 11th; F. N. Whitaker, freight traffic manager, Chesapeake & Ohio, under date of October 9th; E. F. Cost, freight traffic manager, Cleveland, Cincinnati, Chicago & St. Louis Railway Company; F. B. Bowes, general freight agent, Illinois Central Railroad Company, and, in the course of correspondence, communications in regard to the establishment of rates on live stock based on said notice of October 5th were received from C. H. Rockwell, traffic manager, Chicago, Indianapolis & St. Louis Railway Company; L. J. Irwin, general freight agent, Louisville, Henderson & St. Louis Railway Company; S. T. McLaughlin, general freight agent of the B. O. & S. W.; but no response was received from the Louisville & Nashville Railroad Company.

34 Affiant further states that under date of October 31, he received and acknowledged a letter dated October 31, 1901, signed D. M. Goodwyn, general freight agent, reading as follows: "Louisville, Kentucky, October 31, 1901. Mr. T. C. Powell, A. F. T. M., Southern R'y, Louisville, Ky. Dear Sir: Delivery of live stock at Louisville. I beg to hand you herewith copy of our circular, N. S. 1154, of October 16th, with respect to the issuance of live-stock contracts covering specific delivery within the city of Louisville and shall be glad to have you give your agent and representative such instruction as may be necessary to have this circular complied with. Kindly acknowledge receipt of this circular by bearer and advise us if you will comply with our request."

Said circular is as follows:

"Louisville & Nashville R. R. Co.

Office of the general freight agent.

Circular N. S. No. 1154.

(Cancels circular No. N. S. 956 of 10–11–1900.)

LOUISVILLE, KENTUCKY, *October 17th*, 1901.

Delivery of live stock at Louisville, Ky. To agents and connections. In accepting shipments of live stock destined to Louisville, Kentucky, via this company's lines agents and connections must

exercise particular care and see that no agreement appear in the contract to make delivery on any specific switch or siding in the city of Louisville. Shipment may, however, be consigned (as heretofore) to the care of firms or individuals at Louisville, Ky., but no contracts calling for delivery at any special switch or siding must be made or issued.

(Signed) D. M. GOODWYN,
General Freight Agent."

Affiant further says that on October 26th, 1901, he received and acknowledged the following letter dated October 25th, 1901, signed by Mr. Oscar Fenley, president of the Bourbon Stock Yards Company:

"LOUISVILLE, *October 25th*, 1901.

T. C. Powell, Esq., ass't freight traffic manager, Southern Railway Co., Louisville, Ky.

DEAR SIR: An arrangement has been effected by which
35 the Louisville & Nashville Railroad Company will receive live stock at 14th and Ormsby Ave., and transfer it over the Dumesnil switch to the Bourbon stock yards, to be moved for $1.00 per car.

I am advised that your company can, if it choose, avail itself of the decreased rate and the improved service by delivering at Ormsby Ave. connection."

Affiant further says that on October 26th, 1901, he addressed the following communication to Mr. D. M. Goodwyn, general freight agent of the Louisville & Nashville Railroad Company, Louisville, Ky.:

"OCTOBER 26TH, 1901.

Mr. D. M. Goodwyn, G. F. A., Louisville, Ky.

DEAR SIR: Transportation: Switching at Louisville. I am just in receipt of advice from the Bourbon stock yards that your switching rate from 14th and Ormsby avenue to the Bourbon stock yards have been reduced to $1.00 per car. Will you kindly advise if this information is correct and to what extent the switching rate will apply on business delivered you by the Southern railway."

The following response was received from Mr. Goodwyn, dated November 1st, 1901:

"Yours of the 26th file 44–A. In reply thereto, beg to advise that under date of October 14th I advised your Mr. Fitzgerald as follows: 'This is to advise you that effective on the 17th inst., the L. & N. switching charge for handling stock between the Bourbon stock yards and the connecting point of interchange with L. & N. tracks will be $1.00 per car. This charge has heretofore been $2.00 per car. Please acknowledge receipt.'

Yours truly, D. M. GOODWYN, *G. F. A.*"

This notice of the Louisville & Nashville Railroad Company did not indicate any change in the policy of that company in the matter of switching live stock coming from points competitive with that road and was therefore understood to mean that the reduction would apply only on live stock coming from local stations on the Southern railway in Kentucky.

T. C. POWELL.

36 Subscribed and sworn to before me, by T. C. Powell, this the 15th day of January, 1902.

My commission expires the 12 day of January, 1904.

CHARLES JOHANBOEKE,
Notary Public, Jefferson County, Kentucky. [SEAL.]

Official No. D 3.

Southern Railway Company in Kentucky (Incorporated).

St. Louis—Louisville lines.

LOUISVILLE, KY., *October* 31*st*, 1901.

To agents and connections:

Effective November 1st, 1901, a station will be established at Central stock yards, Ky., 9 miles east of Louisville, Ky. Mr. J. H. Ashcraft, Jr., has been appointed as agent.

Connections will please arrange to revise tariffs and division sheets accordingly.

EDWIN FITZGERALD,
Assistant General Freight Agent, Louisville Division.
R. A. CAMPBELL,
Assistant General Freight Agent, St. Louis Division.

The affidavit of J. W. Byrne above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Affidavit of J. W. Byrne.

37 The affiant, J. W. Byrne, says that he is the superintendent of the Central Stock Yards Company, located on the line of the Southern Railway Company in Kentucky at Central Stock Yards station, in Jefferson county, Ky.; that heretofore, to wit, on the 20th day of May, 1901, the said Central Stock Yards Company purchased about twenty-six acres of land in Jefferson county on the line of said Southern Railway Company in Kentucky, for the purpose of constructing and putting in operation a modern and well-equipped stock-yard plant; that since the organization of said company he has been and is now superintendent of said company, and that said company since

the purchase of said twenty-six acres of land has constructed a modern and well-equipped stock-yard plant thereon, with stock-pens and buildings for the caring for, feeding and handling of live stock of every kind, covering about fourteen acres of land with the latest and most modern improvements for stock-yard purposes, and the safe handling of live stock; that the said property was purchased for stock-yard purposes in the quantity demanded by the said Central Stock Yards Company and was the most available to be had in the quantity required, and could not be had in the city of Louisville; that said stock yards have cost in the construction thereof a large amount of money, to wit, about $200,000.00; that said plant has for its use in the receipt and delivery of like stock of every character thereat about 4,000 feet of sidings, switches and tracks; that it has constructed a native-cattle department which consists of ten single and double deck chutes of the dimensions of 40 x 25 feet each, and 53 pens of the dimensions of 40 x 30 feet each, with the capacity of 40 cattle each at least, and 17 pens of the dimensions of 25 x 16 feet each, of the capacity of 20 cattle each, or a total capacity for native of 2,460; that in the said native-cattle department there *is* also constructed 2 Fairbanks scales of the most modern and latest improved pattern, one with the capacity of 81,000 pounds and the other 61,000 pounds, and in the said native-cattle department there has also been constructed a hay pen of the dimensions of 30 x 30 feet, with the capacity for holding ten cars of hay; that it has also constructed under the regulations and requirements of the Government, and under plans approved by the Government a quarantine department for cattle, which consists of 25 pens of the dimensions of 30 x 40 feet each, with a capacity of 40 cattle each, or an aggregate of at least 1000 cattle; that it also has in the said quarantine department 4 cattle chutes, one hay pen, one Fairbanks
38 scales of the most modern and latest improved pattern with a capacity of 61,000 pounds; in the said department there is also a corn crib. Said quarantine cattle department in every respect has been approved by the United States Government inspector.

Affiant further states that the said Central Stock Yards Company has also constructed two buildings known as buildings Nos. 2 and 3, or a hog and sheep department of the said yards; that in the downstairs department of the said hog and sheep department, building No. 2, there are 50 pens of the dimensions of 30 x 30 feet each, with a capacity for 150 each; eight pens of the dimensions of 11½ x 15 feet each, with a capacity of 40 each; and two pens of the dimensions of 29 x 8 feet, with a capacity of 50 each or an aggregate capacity in the said building No. 2 of about 8000; and in the said department or building No. 2 there have been constructed 2 corn bins, and one Fairbanks scale, with the most modern and latest improvements, with a capacity of 61,000 pounds; that upstairs in said building No. 2 aforesaid, there are 32 pens of the dimensions of 30 x 30 feet each, with a capacity of 250 sheep each; 12 pens of the dimensions of 25 x 50 feet each, with a capacity of 100 sheep each; 20 pens of the dimensions of 15 x 15 feet each, with a capacity of 60 sheep each; and 26 pens of the dimensions of 7½ x 12 feet, each, with a ca-

pacity of 30 sheep each, or a total capacity of 11,180 sheep. Also in the said building No. 2 there are 20 assorting pens of the dimensions of 7½ by 18 feet each, and in the upstairs of said building two pair of Fairbanks' scales of the most modern and latest improved pattern, of a capacity of 61,000 pounds each; also 2 hay-houses and 4 inclines for handling the said live stock; that it also has constructed in its said yards another house known as building No. 3 for the handling of hogs and sheep; that there are 17 pens of the dimensions of 30 by 27 feet each, with a capacity of 125 each, and 25 pens of the dimensions of 7½ by 10 feet each, with a capacity of 20 each, or a total capacity in the said downstairs of building No. 3 of 2635; also one Fairbanks scale of the most modern and latest improved pattern of a capacity of 61,000 pounds; that in the said building in the upstairs department thereof there are constructed 26 pens of the dimensions of 40 by 25 feet, with a capacity of 150 each; and 20 pens of the dimensions of 28½ by 20 feet each, with a capacity of 100 each, or a total capacity of 5900 and in the upstairs depart-
39 ment of said building No. 3 there *has* been constructed two corn cribs, and one Fairbanks scale of the most modern and latest improved pattern of a capacity of 61,000 pounds and that in connection with the said hog and sheep department there *has* been constructed 11 single and double deck chutes of the dimensions of 40 by 25 feet each.

Affiant further says that said yards have completed 10 single and double deck chutes attached to the native cattle yards, and also 4 single chutes attached to the quarantine cattle department, all of which are complete; and that for the handling of cattle, hogs and sheep ample facilities exist, with alley-ways and means of placing the same in the departments aforesaid constructed for them through the said building; that the alley-ways and passages, together with the hog pens throughout the said building are paved with vitrified brick, and the said yards in every respect are the most modern and best equipped in the country.

Affiant further says that the said stock yards company has a large number of commission stockmen and brokerage firms at said premises, and the said company and the said brokerage firms have connection and business transactions with a large number of live-stock buyers, packers and dealers throughout the United States, and that unless the Central Stock Yards Company can have deliveries of live stock made at Central stock yards, Kentucky, where its plant is situated, and receive fair and equal treatment with other stock yards in Kentucky, that it will be damaged in many thousand dollars, and that its said damage will be incalculable and not susceptible of measurement by any actions for damage arising from the failure to bill or deliver live stock as directed from any point on the line of the said defendant to Central stock yards, Central stock yards, Kentucky, and required to switch, transfer, and make delivery of live stock to the Southern Railway Company in Kentucky at Louisville and all other connecting lines where same is consigned to Central stock yards or some person, persons, firm or corporation doing business at that place.

Affiant further says that with the appliances of the most modern character, with which plaintiff is equipped, live stock can be relieved from excessive heat or cold as easily and effectively as can be had at any stock yards and that delivery thereof from South Louisville, and the break-up yards of the Louisville & Nashville Railroad Company via Southern Railway Company at 7th and Magnolia
40 avenue can be made more quickly at the Central stock yards than at the Bourbon stock yards.

Affiant further says that it is not true, as stated in the affidavit of Walker D. Hines, that the Central Stock Yards Company, Central stock yards, Kentucky, is a Louisville market, but that on the contrary it is the Central Stock Yards, Kentucky, market. He says that where stock is sold to persons doing business in Louisville, the same is billed from Central stock yards, Kentucky, and shipped to the purchasers at Louisville; that the Southern Railway Co. has built a chute at 30th and Market streets where stock is billed, transported and delivered for butchers and packers in the western portion of Louisville, and that under the contract between the defendant, Louisville & Nashville Railroad Company, and the Bourbon stock yards, the Louisville & Nashville Railroad Company will not make delivery to any packer or butcher in the eastern portion of the city of Louisville, and upon the lines of the Louisville & Nashville Railroad Company, where stock is purchased by any packer or butcher located on the Louisville & Nashville railroad in the eastern portion of the city of Louisville, and such packer or butcher can only have delivery thereof made at the Bourbon stock yards, in Louisville, and that when purchase is made of stock by said packers and butchers at Central stock yards, Central stock yards, Kentucky, the same is billed and shipped over the Southern Railway Company from Central stock yards, Kentucky, to a point of physical connection between the tracks of the Southern Railway Company and the Louisville & Nashville Railroad Company, and there transferred, switched and delivered at the Bourbon stock yards to the purchasers thereof, and that under the arrangements and methods of business adopted by Central stock yards live stock is not driven through the streets of the city of Louisville and the public thereby endangered; and further that the distance from Central stock yards to the packers and butchers in East Louisville, and the packers and butchers in West Louisville is too great to have the said live stock driven through the streets of Louisville with safety to the public and without damage to the said live stock, and that in each instance where shipments are so made, as stated, the same are billed to Louisville, Kentucky, and delivered to the purchaser by the Southern Railway Company at 30th and Market streets, or delivered by the Louisville & Nashville Railroad
41 Company to the purchasers at its only place in Louisville, for delivery, namely, Bourbon stock yards, Louisville, Kentucky.

Affiant further says that it is not true that delivery of live stock by the defendant, Louisville & Nashville Railroad Company, to the Southern Railway Company for delivery by said Southern Railway Company to the Central Stock Yards Company, Central stock yards,

Kentucky, is as burdensome as making a delivery of live stock to a private switch or siding, as the consignment of live stock to the Central stock yards come in larger quantities than come to a private switch or siding, and that a number of cars could thereby be delivered to the Southern Railway Company at one and the same time from South Louisville by being placed upon the switch or siding at 7th and Magnolia streets, a distance of only about a mile and a half from South Louisville, and thence removed to Central stock yards a distance of about one mile and a half, or a total distance of about three miles; when if same is delivered from the break-up yards of the Louisville & Nashville Railroad Company at South Louisville to the Bourbon stock yards, the distance is from six to eight miles, with switching necessary at East Louisville to place the same on the tracks and at the chutes for unloading at the Bourbon stock yards.

Affiant further says that under the contract between the Central stock yards and the Southern Railway Company, filed with the affidavit of B. H. Hurt, president of said Central Stock Yards Company, live stock where consigned over the said Southern Railway Company to persons at Central stock yards, Kentucky, delivery thereof is made to the consignee or owner of the stock without any charge for loading or unloading thereof or for keeping the same until the owner thereof shall have a reasonable opportunity to receive and dispose of it as he sees fit. He says that it is true that if the owner chooses to leave the said live stock with the Central Stock Yards Company to be kept and held for him, which is entirely optional with him, Central Stock Yards Company only makes a reasonable charge for such care, keeping and attention given to such live stock.

Affiant further says it is true that to reach the point of connection, to wit, 7th and Magnolia avenue, from the break-up yards of the Louisville & Nashville Railroad Company, at South Louisville, it would be necessary to have live stock destined to the Central
42 stock yards placed by a switch-engine upon the connection at 7th and Magnolia, a distance of about a mile and a half from South Louisville; but it is not true, as stated in the affidavit of Walker D. Hines, that a delivery to the Central stock yards, via the Southern Railway Company at 7th and Magnolia, requires the use of two miles of defendant's terminal tracks, or any use of defendant's tracks by the Southern Railway Company to make delivery thereof to the Central stock yards, or that such delivery is more burdensome than for the Louisville & Nashville Railroad Company to make delivery thereof at the Bourbon stock yards.

And affiant further says that he did business for a number of years at the Bourbon stock yards and knows that a charge is made against the Louisville & Nashville Railroad Company where stock is delivered thereat of 50 cents per car, and that where the defendant Louisville & Nashville Railroad Company, makes delivery to the Central stock yards via Southern Railway Company at 7th and Magnolia no charge is made against the Louisville & Nashville Railroad Company for unloading such live stock, and that thereby the defendant, Louisville & Nashville Railroad Company is saved 50 cents per car by making delivery at a distance of one and a half miles

from South Louisville and at 7th and Magnolia avenue from making delivery at the Bourbon stock yards a distance of six or eight miles from the break-up yards of the Louisville & Nashville Railroad Company at South Louisville.

Affiant further says it is not true that by requiring the defendant Louisville & Nashville Railroad Company to make delivery of stock consigned to Central stock yards to the Southern Railway Company at 7th and Magnolia connection that same would require of defendant to establish against its will any new or through route for the transportation of cattle to points on its own line to the Central stock yards on the line of the Southern Railway Company, as in each and all of such cases the full Louisville freight rate and charge made by the Louisville & Nashville Railroad Company is paid to it by the shippers and owners of live stock, and that by making such delivery no use of the defendant's terminal facilities and tracks is demanded, or required by the Southern Railway Company and no damage, loss or injury would or could be occasioned the said defendant Louisville & Nashville Railroad Compaay.

JOS. W. BYRNE.

43 Subscribed and sworn to before me, by J. W. Byrne, this 16th day of January, 1902. My commission expires the 22d day of March, 1904.

H. V. DAVIS,
Notary Public, Jefferson County, Kentucky.

The affidavit of J. E. Miller above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Affidavit of J. E. Miller.

Affiant, J. E. Miller, being duly sworn, says that he is a member of the commission firm of Stewart, Sanders, Miller & Company, with an office at Central stock yards, Kentucky, and the plant of the complainant, Central Stock Yards Company, and that at said plant there are quite a number of other commission merchants and foreign buyers who have business connection with a large number of butchers, packers, raisers and live-stock dealers throughout the State of Kentucky, and other States of the Union, and that unless the Central Stock Yards Company can have deliveries of live stock made at Central stock yards, Kentucky, where its plant is situated, and receive fair and equal treatment with other stock yards in Kentucky, that the said Central Stock Yards Company will be damaged in many thousand dollars, and the commission merchants and dealers in live stock thereat will likewise suffer great and irreparable damage, and that the damage to said Central Stock Yards Company

and to the commission merchants and dealers in live stock thereat will be incalculable and not susceptible of measurement by any actions for damages arising from failure to receive stock to be handled thereat by Central stock yards, or sales made thereof by commission firms and dealers located there.

44 He further says that the commission firms, and his firm, are receiving letters from patrons in Tennessee and other States *in* Kentucky (*sic*) expressing a desire to ship stock to Central Stock Yards Company for sale through commission merchants located there, but are deterred from doing so by the refusal of the Louisville & Nashville Railroad Company to deliver the same to Central Stock Yards Company at Central stock yards, Kentucky, and that the Central Stock Yards Company has been unable to get stock from Tennessee and other States than Kentucky since the injunction as to the State of Kentucky by the courts of Jefferson county, only by having same reshipped from the Bourbon stock yards to Central Stock Yards plant at Central stock yards, Kentucky, and that the defendant, Louisville & Nashville Railroad Company, in conjunction with the Bourbon Stock Yards Company have delayed shipments when so ordered to such an extent as to occasion great delay in making sales of the stock as ordered by the owners with great loss in weight to the live stock so shipped.

He further says that the damage to the Central Stock Yards Company in failing to get stock shipped will be impossible of measurement, because of the inability of the said Central Stock Yards Company or the commission firms doing business thereat, to determine what stock would have been shipped to the Central Stock Yards plant had Central stock yards, Kentucky, been upon the same footing with other stock yards and places for sale of live stock without discrimination against the said Central stock yards; and that further, where ascertainable as to the stock that would have been shipped the measurement of damage sustained by delays in making delivery will be impossible of correct ascertainment, and no means is furnished to The Central Stock Yards Company, complainant herein, or to the commission firms and dealers thereat, of accurately measuring the extent of their damage, and that, therefore, their said damage, and particularly the damage of the Central Stock Yards Company in the failing to have the stock for care and attention will be incalculable and not susceptible of measurement, and that the injury to the complainant and to the commission merchants at complainant's plant is a continuing injury from day to day, and if not prevented by an injunction or order of court requiring that the defendant, Louisville & Nashville Railroad Company, as a common carrier shall treat the Central Stock Yards Company, located at Central stock

45 yards, Kentucky, with fairness and place the same on equality with competitive companies that such course of conduct will result in the disorganization of the business arrangements and agencies of the various commission firms and live-stock dealers at Central stock yards, and raisers, dealers, handlers of live stock in Tennessee and other States than Kentucky, and result in the disor-

ganization and disruption of the business arrangements of complainant and the commission firms doing business at its plant, Central stock yards, Kentucky.

He files herewith as a sample of the letters received by his firm and commission firms at Central stock yards, Kentucky, a letter dated January the 9th, 1901, from one P. L. Reynolds a resident of Lancaster, Tennessee, and also a copy of a letter from the same party of date January 14, 1902, assigning reasons why shipments of live stock had not been made to affiant's firm.

He says that if the course of conduct on the part of the defendant is continued that the affiant for his firm and other commission merchants and dealers at Central stock yards, Central stock yards, Kentucky, will be unable to determine the stock diverted from them by the discriminating and unjust conduct on the part of the defendant, Louisville & Nashville Railroad Company, and in such manner it will be impossible to determine the extent of the injury to complainant, Central Stock Yards Company and to the commission merchants thereat, and that suits for damage arising upon the failure to ship each and all consignments offered would involve a multiplicity of suits, and would not afford to complainant, Central Stock Yards Company, or to the commission merchants doing business at said plant, any adequate or sufficient remedy for the injury inflicted upon them.

J. E. MILLER.

Subscribed and sworn to before me by J. E. Miller this 16th day of January, 1902. My commission expires the 12th day of January, 1904.

CHARLES JOHANBOEKE,

[SEAL.] *Notary Public, Jefferson County, Kentucky.*

The letters above referred to are as follows:

LANCASTER, TENN., *Jan.* 9, 1902.

Mess. Stewart, Sanders, Miller & Co., Louisville, Ky.

GENTLEMEN: I ship you some time ago a load of hogs that helt out well in weight only lost about 8 lb. to the head and made
46 a nice profit, but the load you sold for me on Jan. the 8th, lost in weight 1937 lbs. at least 1000 more than they ought to and lost me $104.87 in money besides my work I send you expense bill and a list of the hogs and who I bought them from and what each lot weighed. I had the hogs billed to Central stock, Louisville, Ky., but the R. R. would not take them billed that way Mr. W. B. Simpson (an old trader) looked at the hogs before I shipped them and said they would make good money and wanted to buy them. I think the R. R. has damage- me at least $150.00 and I think you ought to make them pay it. I have another load to ship in the morning if I get a car I hope to come out better next time it take- a heap of hard work to get up a load of hogs they are very scarce and hard to buy so please help me out this time.

P. L. REYNOLDS.

LANCASTER, *Jan.* 14, 1902.

Messrs. Stewart, Sanders, Miller & Co., Louisville, Kentucky.

DEAR SIRS: The only reason I did not ship you the load of hogs Friday was because I was afraid the R. R. would not deliver them promptly and they would not be sold until Monday. I don't blame the firm of Stewart, Sanders, Miller & Co., with none of my loss and hope you will not think I did you an intentional wrong in not shipping to you.

Respectfully,

(Signed) P. L. REYNOLDS.

Yours very respectfully,

STEWART, SANDERS, MILLER & CO.

R.

The affidavit of R. C. Watkins above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

R. C. Watkins, being duly sworn, says: I am vice-president
47 and traffic manager of the Central Stock Yards Company, and that the said company's plant is located at Central stock yards, Jefferson county, Kentucky, a duly established local station with authorized local agent on the line of the Southern Railway Company in Kentucky, and that said station is shown by the station list of said Southern Railway Company in Kentucky as being nine miles from its terminus in the city of Louisville.

Affiant further states that the Louisville & Nashville Railroad Company has no tracks at the said Central Stock Yards station, and that it is in no way prepared to handle stock from said Central Stock Yards station, therefore, the only way that stock can be handled from the said Central Stock Yarks station to the Bourbon stock yards at Louisville, Kentucky, is over the tracks of the Southern railway to Louisville, which in all instances is regularly billed by the agent of the Southern railway at Central stock yards, Kentucky, to Louisville, Kentucky, and by the Southern railway agent, at Louisville, Kentucky, delivered to the Louisville & Nashville Railroad Company to be switched, as all other stock is switched, which comes over the said Southern Railway Company's line, and from all of its local or non-competitive stations, which is stated the Louisville and Nashville Railroad Company will and does switch to the Bourbon stock yards at Louisville, Kentucky.

Affiant further states that he was for many years connected with the Illinois Central Railroad Company as its traveling freight agent, during which service the Louisville & Nashville Railroad Company refused to switch live stock coming from competitive points to the

Bourbon stock yards at Louisville, but just prior to the opening of the Central stock yards the Louisville and Nashville Railroad Company notified the Illinois Central Railroad Company that they would switch all stock coming into Louisville over their line from any point, and they are now switching stock coming from Hopkinsville, Ky., and from Memphis, Tenn., both competitive points between the Louisville & Nashville Railroad Company and the Illinois Central Railroad Company.

The affiant further states that his company nor no one connected with it, directly or indirectly, are hostile to the Louisville & Nashville Railroad Company, or its interests, and there is being delivered to the Louisville & Nashville Railroad Company live stock originating at Central stock yards, Kentucky, destined to eastern points and shipped over the Louisville & Nashville railroad from Louisville.

48 The affiant further states that the Louisville & Nashville Railroad Company has equal privileges and rights with other railroads, in securing live stock shipments from the Central Stock Yards Company plant, and that the same has been switched to them without prejudice in every instance, and this will continue to be the case, and such service will continue to exist.

R. C. WATKINS.

Subscribed and sworn to before me by R. C. Watkins, this 17th day of January, 1902. My commission expires the 12th day of January, 1904.

[SEAL.] CHARLES JOHANBOEKE,
Notary Public, Jefferson County, Kentucky.

The affidavit of B. H. Hurt above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Affidavit of B. H. Hurt.

B. H. Hurt, being duly sworn says that he is the president of the Central Stock Yards Company, and that he has carefully read the affidavit of Walker D. Hines, first vice-president of the Louisville & Nashville Railroad Company, and that the statement therein that before the erection of any of the structures of the Central Stock Yards Company he (Hurt) came to the president of the Louisville & Nashville Railroad Company, and also went to the general manager of the said Louisville & Nashville Railroad Company and asked if arrangements could be made for the receipt and delivery by the Louisville & Nashville Railroad Company of live stock at stock yards to be erected where the present stock yards of the Central stock yards are located,

and the said Smith at said time, and before any of the work
49 or buildings of said company had been erected, advised him, the said Hurt, that the Louisville & Nashville Railroad Company would not and could not receive or deliver live stock at said Central Stock Yards' plant, or at any other place than at its regular live-stock depot at Bourbon stock yards, is a mistake, and not true in fact; that he did call upon said Milton H. Smith, as president of the Louisville & Nashville Railroad Company and the general manager of the said Louisville & Nashville Railroad Company, and asked them whether or not they would, at the point of intersection of the lines of the Louisville & Nashville Railroad Company with those of the Southern Railway Company in Kentucky, near the premises of the Central Stock Yards Company to be constructed, build a switch connecting the said Louisville & Nashville Railroad Company with the tracks of the said Southern Railway Company, and that the said Smith, as president of the Louisville & Nashville Railroad Company, and the general manager of the said company, advised him that the said Louisville & Nashville Railroad Company would not construct such switch for delivery at that point; but there was nothing then said as to whether or not the Louisville & Nashville Railroad Company would receive, transport, switch or deliver live stock to the Southern Railway Company or any connecting carrier for delivery by said Southern Railway Company or such connecting carrier to the plant to be constructed by the said Central Stock Yards Company. He says that he received a letter from the general manager of the Louisville & Nashville Railroad Company showing the nature of his request of said railroad, and its action thereon, which is dated December 18th, 1900, and reads as follows:

"DECEMBER 18TH, 1900.

Mr. B. H. Hurt, No. 102 West Main street, Louisville, Ky.

DEAR SIR: Please refer to conversation in this office relative to the construction of a siding in connection with tracks of this company across certain property owned by you near our South Louisville yards.

I wish to advise that the Louisville and Nashville Railroad Company must decline to construct the siding in question. I return the blue-print map you left with me.

Yours truly,

G. E. EVANS,
General Manager."

50 He says that on December 14th, 1891, John Cudahy purchased from the Louisville and Nashville Railroad Company and for stock-yard purposes certain tracts or parcels of land, as per deed recorded in Deed Book 389, page 324, in the office of the county clerk of Jefferson county, Kentucky, and in part consideration therefor the said John Cudahy was to, and did, dedicate for street purposes a strip of ground 30 feet wide, or the eastern one-half of Floyd street, if extended, from the right-of-way line of the old Louisville Southern railroad, now Southern Railway Company in Kentucky, to the southern boundary of the land conveyed by said deed, and that

afterwards on the 10th day of June, 1892, the said John Cudahy, without being joined by his wife, conveyed to the Louisville Terminal Railway Company a right of way 30 feet in width over and along the land so purchased by said John Cudahy, beginning at a point where the line of the said John Cudahy in aforesaid deed intersects Floyd street, if extended, and running thence eastwardly along the land of the said John Cudahy so purchased from the Louisville & Nashville Railroad Company and along the Louisville Southern railroad, now the Southern Railway Company in Kentucky, to the eastern line of the said track, which said conveyance was never by the said John Cudahy acknowledged or recorded, or the instrument conveying or attempting to convey said right of way signed by the wife of the said John Cudahy, and afterwards, on December 8th, 1900, as per deed recorded in Deed Book 544, page 264, the said John Cudahy and wife conveyed all of said land, disregarding the said conveyance to the said Louisville Terminal Railway Company; to said B. H. Hurt, and that afterwards the said B. H. Hurt, on the 20th day of May, 1901, as per deed recorded in Deed Book 555, page 407, conveyed to the said Central Stock Yards Company of the said tract of land so purchased from the said John Cudahy, and by the said John Cudahy purchased from the Louisville & Nashville Railroad Company certain portions or parcels of the said land, and that no part of the said land so purchased by the said Central Stock Yards Company from the said B. H. Hurt is within the said city of Louisville, but that on the 14th day of September, 1901, there was conveyed to the said Central Stock Yards Company the right, title, claim and interest by said B. H. Hurt, in and to the strip of land 30 feet in width in the use and occupancy of the Louisville Terminal Railway Company under aforesaid unrecorded conveyance of the said John Cudahy to said Louisville Terminal Railway Company.

51 Affiant further says that he was one of the promoters of the Central Stock Yards Company, but that it is not true that he was the chief promoter; but as a matter of fact he took up the matter of the advisability of the construction and putting in operation of another stock yards for the receipt, caring for, handling and sale of live stock of every character raised and produced within the State of Kentucky, and States tributory thereto, but he canvassed the matter with live-stock dealers, raisers and packing establishments throughout the United States and found that the delivery of live stock for market in Kentucky over any other railway entering the city of Louisville than the Louisville & Nashville railroad was to a certain extent at the mercy of the Louisville & Nashville Railroad Company in the matter of making delivery at the Bourbon stock yards, and that such yards were only reached by use of the lines or track of the said Louisville & Nashville Railroad Company; and he further ascertained and found, in connection with his associates, that at some point in or near the city of Louisville a stock yard could be erected more accessible to all of the roads entering the city of Louisville than the Bourbon stock yards, and afterwards effected arrangements, before the construction of the said plant, with the Southern

Railway Company in Kentucky for delivery at such point, so to be erected, of all live stock so consigned without discrimination and whether the same originated on the said Southern Railway Company in Kentucky, or any other line of railway in or out of Kentucky entering the city of Louisville, and that the property upon which the Central Stock Yards Company's plant was and is erected was the most available property to be purchased for such purpose and near the break-up yards of the Louisville and Nashville Railroad Company in south Louisville.

He further says that he and his said associates were advised that under the laws of the State of Kentucky all enterprises and particularly the Central Stock Yards Company, would have to be treated by all railway companies upon an equal basis with like plants or companies, and that under the said laws governing common carriers the raisers, dealers and handlers of live stock in Kentucky and the States tributory thereto believing that deliveries could be made at said Central stock yards, and further believing that by the construction of a modern and well-equipped plant, as has been constructed by the Central Stock Yards Company, the live-stock business in Kentucky could be greatly increased and the interest
52 of the raisers and dealers and handlers of live stock greatly promoted by such company the said parties in interest invested a very large sum of money necessary to the construction and erection of said Central stock yards, and that in asking for deliveries at said Central Stock Yards Company it is not claimed or insisted that any railway company shall make any deliveries thereat if otherwise requested or directed by the raiser, dealer or handler of such live stock so placed upon the market in Kentucky, and that the whole effort of the said Central Stock Yards Company by this suit is to be put on equality with other enterprises of like character without any favoritism shown to it, or discrimination against it.

He further says that he has carefully examined into the facilities of the Louisville and Nashville Railroad Company for making delivery of live stock consigned to the Southern Railway Company in Kentucky for delivery at said Central stock yards, and that inasmuch as the said break-up yards of the Louisville & Nashville Railroad Company *is* within a few hundred yards of the plant of the Central Stock Yards Company he has been informed and knows that live stock can be more speedily delivered to the said Central stock yards, either by the Louisville & Nashville Railroad Company from its break-up yards, or the Southern Railway Company, and especially from all other railway companies entering the city of Louisville, than delivery thereof can be had or made at the said Bourbon stock yards, but that it has not been the purpose of his said yards to ask any discrimination against or favoritism to its said yards on the part of any railroad company entering the city of Louisville.

Affiant further says that under and by the terms of the contract made between the Southern Railway Company in Kentucky and the Central Stock Yards Company establishing the Central Stock Yards Company as the live-stock depot of the Southern Railway Company

in Kentucky, the said Central Stock Yards Company is not made the exclusive live-stock depot of the said Southern Railway Company in Kentucky, where the owners and consignors desire and request that the said live-stock by them so consigned be delivered at some other point in or near Louisville than said Central stock yards, and he files herewith and makes a part of this, his affidavit, to the same extent as if copied herein, a copy of the contract between the said Southern Railway Company in Kentucky and the said Central Stock Yards Company.

Affiant further says that he has read the affidavit of J. W.
53 Byrne, superintendent of Central Stock Yards Company, herein, and personally knows that the responsive part of the said affidavit to the affidavit of Walker D. Hines is true, and he adopts so much of the said J. W. Byrne's affidavit as part of this, his affidavit.

B. H. HURT.

Subscribed and sworn to before me, by B. H. Hurt, this 16th day of January, 1902. My commissions expires the 12th day of January, 1904.

CHARLES JOHANBOEKE,
[SEAL.] *Notary Public, Jefferson County, Kentucky.*

The contract above referred to is as follows:

This agreement, made this May 1, 1901, by and between the Southern Railway Company in Kentucky, a corporation organized under the laws of the State of Kentucky, and hereinafter called the railway company, of the first part, and the Central Stock Yards Company, a corporation duly organized under the laws of the State of Delaware, and hereinafter called the stock yards company, of the second part,

Witnesseth, as follows: The stock yards company is incorporated under the laws of the State of Delaware, with the right to do business in Louisville and Jefferson county, Kentucky, and is the owner of certain property situated on what would be Floyd street if extended, adjoining the right of way of the railway company.

The railway company is a corporation organized under the laws of the State of Kentucky, and besides owning and operating a line of railroad in Kentucky, has connections, directly and indirectly, with divers other lines of railroad in and out of the State of Kentucky.

The railway company desires to establish a general live-stock depot for the receiving and delivery of live stock at Louisville, Kentucky, and the said stock yards company is willing to furnish to the said railway company proper facilities therefor.

Now, in consideration of the premises, it is agreed between the parties hereto as follows:

1. The stock yards company agrees to build, maintain and operate upon its property described as above, modern and complete stock

yards, with all necessary buildings and pens for the com-
54 fortable, safe and convenient handling of stock, and loading and unloading the same, and to continue to maintain and operate the said stock yards during the existence of this agreement.

2. The said stock yards company agrees that it will receive live stock of all kinds from said railway company or for said railway company at its stock yards and premises as aforesaid, and will, for receiving and caring for and delivery of stock, charge not more than fifty (50) cents per car for unloading, and fifty (50) cents per car for loading, to be paid by the said railway company when, and only when, the stock is brought to or shipped from Louisville over the lines of the said railway company including the St. Louis-Louisville line of the Southern Railway Company. No charge is to be made for loading or unloading where less than a car-load rate is charged for the shipment as per waybill; and there the railway company receives only a switching charge from connecting lines, the loading or unloading charge is not to be paid by the said railway company.

3. The stock yards company is to be responsible to the railway company, and to the shipper or consignee, for all accidents in loading or unloading said stock, or while the same is in its possession, and is to indemnify and save harmless the railway company against any loss arising from any injury to said stock in loading or unloading, or awaiting loading or unloading while in its possession; and said stock is to be considered as in the possession of the stock yards company from the time the loaded cars are put on its siding, or from the time the said stock yards company is notified of the readiness of the said railway company to put the said cars upon its said siding, and the said stock yards company is unable, from some disability or fault of its own, to receive the same. But the railway company is to be responsible for any loss which may occur from any default on its part in placing cars at the loading chutes to be unloaded, or taking away the same after they are loaded ready for transportation.

4. The railway company agrees to, and does hereby, establish the premises of the stock yards company as its live stock depot for the purpose of handling live stock to and from Louisville, and agrees that during the existence of this agreement it will not sell, lease, use or license to be used, any of its ground in or adjacent to the city of Louisville, for the establishment of any other stock yard or stock yards or otherwise facilitate the establishment of any stock yard for the said city, and will establish no other live-stock depot at or
55 adjacent to said city, and will not deliver live stock to any other stock yards now or hereafter established in Louisville, unless so positively required and exacted by the shipper. And, in the event that delivery to any other stock yard is so required, the railway company will not absorb, except from competitive points, any part of the switching charge assessed by connecting line or lines.

5. The railway company agrees to establish Louisville rates to and from the premises of said stock yards company on all live stock coming from or going to lines embraced in the following specification, and the said Louisville rates shall include delivery to, or cost

of handling from, the chutes or pens of the stock yards company, namely:

Points on the St. Louis division of the Southern railway, including St. Louis and East St. Louis, and traffic handled via those junctions.

Points on its own lines, including local, as well as junction points.

Points on the Cincinnati, New Orleans & Texas Pacific railway between Cincinnati and Chattanooga, including local, as well as junction points.

Points on connecting lines between its own line and the Cincinnati, New Orleans & Texas Pacific railway, namely, Frankfort, Cincinnati, Lexington & Eastern—Louisville & Atlantic, and such other connections as may hereafter be made.

Points south of Harriman Junction and south of Chattanooga, including business originating on foreign lines, handled by the Southern railway to Harriman Junction, or delivered to the Cincinnati, New Orleans & Texas Pacific railway at Chattanooga, by the Southern Railway Company or by any other line.

6. The railway company agrees to perform switching service between the stock yards company and connections with other lines in Louisville as per the following schedule, and the said switching rates shall include delivery to or cost of handling from the chutes or pens of the stock yards company.

Between the Illinois Central R. R. at 14th and Magnolia streets, or any other connection which may be hereafter established in the city of Louisville, and the Central Stock Yards Company..... $2 per car.

Between the L. H. & St. L. R'y at 14th and Magnolia streets, or any other connection which may be hereafter established in the city of Louisville, and the Central Stock Yards Company ..... $2 per car.

56

Between the B. & O. S. W. Youngtown or any other connection that may hereafter be established in the city of Louisville, and the Central Stock Yards Company..... $2 per car.

Between the L. N. A. & C. or C. I. & L., Youngtown or any other connection that may hereafter be established in the city of Louisville, and the Central Stock Yards Company ..... $2 per car.

Between the L. & N. R. R. at 4th avenue and the Central Stock Yards Company..... $2 per car.

Between the L. & N. R. R. at 7th and Magnolia or such other connection as may hereafter be established in the city of Louisville, and the Central Stock Yards Company except 4th avenue ..... $2 per car.

Between the P. C. C. & St. L. via I. C. R. R. at 14th and Magnolia streets, or such other connection as may hereafter be established in the city of Louisville, and the Central Stock Yards Company as Southern railway proportion of joint switching..... $1 per car.

Between the C. C. C. & St. L. via I. C. R. R. at 14th and Magnolia streets, or such other connection as may hereafter be established in the city of Louisville, and the Central Stock Yards Company as Southern railway proportion of joint switching rate..... $1 per car.

Between the C. & O. R. R. via I. C. R. R. and 14th and Magnolia streets, or such other connections as may hereafter be established in the city of Louisville, and the Central Stock Yards Company as Southern railway proportion of joint switching rate..... $1 per car.

It is further agreed that should the L. & N. R. R. Co. at any time during the existence of this contract, reduce the switching charges to the Bourbon Stock Yards Company then the railway company will meet the situation and making a corresponding reduction to the stock yards company as far as lies in its power.

7. The railway company, desiring to assist in building up the live-stock business to and from Louisville, agrees to place no re-
57 striction son the handling of stock to and from the stock yards company; and that it will switch freely, and with all reasonable promptness any and all live stock offered to it for delivery to the stock yards company or to be switched from the stock yards company to any connecting lines, even though the same may be coming from or going to a competitive point.

8. This contract is to take effect upon fifteen (15) days' written notice on the part of the stock yards company to the railway company, of its readiness and ability to comply with the provisions of this contract, and not later than the first day of October, 1901, and remain in full force and effect for the term of ten years from the said date unless sooner terminated by mutual consent, or by operation of law.

In testimony whereof, the parties hereto have caused these presents to be executed in duplicate, by their duly authorized officers, with their corporato seals affixed, on the day and year first above written.

The answer above referred to is as follows:

United States Circuit Court, Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Answer.

The defendant, The Louisville and Nashville Railroad Company, for answer to the bill of complaint herein denies that the acts complained of therein, or any of them, so far as they are acts of this defendant, are in violation of the Constitution or laws of the United States or statutes thereunder, or any such law or statute. It denies that the Southern Railway Company has three points of physical connection between its tracks and those of this defendant at Louis-

ville, Kentucky. Defendant denies that what is called in the bill of complaint the Bergen & Meehan connection is such a connection, and says that said switch is a private switch belonging to a private party, and not to the Louisville & Nashville Railroad Company, and is not subject to its general use.

58 While there is a connection at Fourth avenue in the city of Louisville, yet this is a wholly impracticable place for the regular interchange of freight in car-load lots; there are *no side tracks at this place, and any car left by one company to be* taken by the other at this point would have to stand on either the main track of the Louisville & Nashville Railroad Company, over which its freight and passenger trains pass, or on the main track of the Southern Railway Company, over which its freight and passenger trains pass, until such car can be taken by the other company. And as a very great amount of business is done over these tracks, it will be utterly impracticable to use this connection as a regular place of exchange between the two said companies.

As to the other point of physical connection referred to in the bill of complaint, to wit, the connection at Seventh and Magnolia streets, this point is about two miles north of southern Louisville and the south Louisville yards referred to in the bill of complaint, and is about one and one-half miles south of defendant's station at Tenth and Broadway. To reach this point of connection, to wit, at Seventh and Magnolia avenue, if the cars were already at south Louisville, it would be necessary to have a switch-engine and crew take them and carry them northwardly about two miles over its tracks referred to from south Louisville toward its aforesaid station at Tenth and Broadway, which is entirely out of the course by which live-stock cars travel from south Louisville to its live-stock depot at the Bourbon stock yards. And if the said cars had come from the East and were in its East Louisville yards, which are very near the Bourbon stock yards, it would be necessary, in order to reach the connection at Seventh and Magnolia, for a switch-engine and crew to take the said cars from the East Louisville yards for about 4½ miles in a southwestwardly direction to south Louisville, and then for another switch-engine and crew to take them from south Louisville about two miles northwardly as aforesaid to the said Seventh and Magnolia Avenue connection. The switch engines which do the business between south Louisville and east Louisville are not the same as those that do the business between south Louisville and the aforesaid Tenth and Broadway station, and the same switch-engines could not do the business on both said lines, because the amount of business done over said respective lines is so great that separate engines and crews are required for the separate lines.

59 Defendant denies that to have changed the destination of stock referred to in the bill of complaint in the manner therein alleged, would have been less inconvenient or burdensome to do than to have taken such shipments to the Bourbon stock yards, or would have made a difference in the haul of five or six miles.

Defendant denies that its actions under the contract between it

and the Bourbon Stock Yards Company referred to in the bill of complaint give an undue or unreasonable preference or advantage to the Bourbon Stock Yards Company over the Central Stock Yards Company or is an undue or unreasonable prejudice or disadvantage to the said Central stock yards or that its action is for the purpose of breaking up the Central Stock Yards Company.

Defendant denies that its refusal to receive, bill, transport, transfer, switch or deliver live stock as described in the bill of complaint has greatly damaged the complainant or is in violation of any law of the United States, or is unjust, unauthorized or unlawful discrimination against complainant, or that unless enjoined from doing so it will result in great or irreparable injury to complainant.

Defendant denies that it requires or compels shippers to consign their stock as directed by it, although it admits that it will not receive live stock when an agreement is demanded that it shall deliver the same to the yards of the Central Stock Yards Company.

II.

Further answering, herein, defendant says at a place such as the city of Louisville it is absolutely essential to the proper management and handling of business that a railroad company handling a large amount of live stock, either bringing it to the Louisville market, or taking it from that market, should have a regular live-stock depot provided with facilities for handling and taking care of that peculiar species of property. Live stock need peculiar attention. They have to be fed and watered at regular intervals to keep them from suffering, and preserving them in good condition. They are liable, when large numbers of them are placed in cars, as is a necessity, to get down and be trampled upon, a liability which, of course, increases the longer they stay confined in one car or other place. Moreover, certain kinds of live stock suffer greatly from extreme heat or extreme cold. In very hot weather it is of the greatest importance in handling such stock to unload them from cars as quickly as possible and throw water upon them in order to reduce their bodily heat, and save their lives. The longer they stay in the cars in which they have been transported, the more liable do they become to injury from any of the causes above mentioned.

On the other hand as to most dead freight, to wit, all except certain kinds of perishable property, it can stand loaded in cars, without material injury, and is not affected by the moving and shifting of the cars as living animals are.

Facts and considerations such as the foregoing make it necessary that there should be a difference between the manner of handling dead freight and the manner of handling live stock, and they make it essential that a railroad company handling a large amount of live stock into or out of a particular market such as Louisville, should have a regular live-stock depot where prompt attention can be given to such live stock by men who are skilled in the handling of this particular property.

Many years ago, to wit, in 1880, which was at least twenty years before the establishment of the stock yards of complainant, The Cen-

tral Stock Yards Company, the Louisville & Nashville Railroad Company, in order to establish a live-stock depot which would enable it to properly handle and care for live stock as above explained, did enter into a written contract with the Bourbon Stock Yards Company of the city of Louisville, for a period of ten years from that date, which contract was afterwards supe-seded by a written contract between the said parties, which took effect on August 1, 1888, and continued by its terms for ten years from that date, and which last-mentioned contract was afterwards extended by agreement in writing between said parties for the term of ten years from September 20, 1898, this being the contract referred to in the bill of complaint herein.

The substance and effect of the said written contract was and is that the Louisville & Nashville Railroad Company established a live-stock depot for the Louisville market at the Bourbon stock yards in Louisville, Kentucky, which yards were contiguous to the lines of the Louisville & Nashville Railroad Company and were situated at a point of convenient access both to the lines of defendant extending from Louisville eastwardly to Cincinnati, Ohio, and also with those of defendant extending from Louisville southwardly to Nashville, Tennessee, and points beyond, over both of which lines the defendant does a very large amount of business,
61 and carries a very large amount of live stock, both in and out of the city of Louisville.

By said agreement defendant agreed that it would not establish, or in any manner facilitate the establishment of, any other stock yards or stock depot in said city, and that it would deliver and cause to be delivered at the Bourbon stock yards, so far as it might lawfully do so, all live stock shipped over its road and consigned to the city of Louisville; and on the other hand, by said contract, the Bourbon Stock Yards Company agreed that it would maintain and keep its stock yards in good condition with sufficient and ample facilities for the handling of all live stock which should come to such yards, with proper conveniences for doing such business, such as are usual and customary in the best conducted stock yards in this country, and that it would always keep on hand at such yards a sufficient number of skilled workmen to perform this class of service, and generally to do such work and labor as is usually provided in stock yards of the best class; and that it would load and unload all live stock that might be brought to such yards; for which services the Louisville & Nashville Railroad Company agreed to pay said stock yards company fifty cents per car. And the said stock yards company further agreed that all charges which it might make for keeping, feeding, or caring for live stock coming to its yards under that contract, either directly or indirectly, should be reasonable, and that it would not charge any more for keeping, feeding and caring for the live stock of its patrons than is charged for the same services or supplies by other stock yards in said city.

In other words, said Bourbon Stock Yards Company, by said contract, agreed to load and unload live stock, and to place the same in the delivery pens when unloaded, for a certain rate to be paid by the

Louisville & Nashville Railroad Company (but not by the shipper). It further agreed for the benefit of the public generally that the charges which it should make for keeping live stock after delivery, and for caring for the same and feeding the same, if the owners should choose to leave their stock at the Bourbon stock yards, should be reasonable.

When live stock is delivered at said live-stock depot at the Bourbon stock yards, it is without any charge to the owner, unloaded and held for the owner for a reasonable time to enable him to get the stock, and either take it away, or arrange for its further care and maintenance. For the loading and unloading of such
62 stock no charge whatever is made against the owner. It is true that after stock is delivered at the Bourbon stock yards the owner has the privilege, if he chooses, to order the Bourbon Stock Yards Company to retain said stock for him and to feed and care for it until he can sell it, or until he desires to take it away to some other point, but this is a matter entirely optional with the owner. He can leave it at these yards or take it away, as he pleases, and the Louisville & Nashville Railroad Company in making the contract just mentioned took pains to secure an agreement on the part of the Bourbon Stock Yards Company, as heretofore stated, that its charges for caring for such stock as might be left with it should be reasonable, and that its attention thereto should be proper.

Since the making of said original contract of 1880 between defendant and the Bourbon Stock Yards Company, it has been faithfully kept by both parties thereto. The Bourbon Stock Yards Company has provided at the said stock yards ample facilities for the handling of all live stock which comes to the Louisville market, and has also provided and maintained there an ample force of men skilled in the handling of such property, and has carefully and efficiently handled the said live stock; and this defendant on its part has always insisted and demanded that all deliveries of live stock by it or to it for the Louisville market should be at its live-stock depot at the Bourbon stock yards.

On the faith of said contracts both parties thereto, to wit, the Louisville & Nashville Railroad Company and the Bourbon Stock Yards Company have expended large sums of money. The Louisville & Nashville Railroad Company has arranged its tracks and many side tracks so as to facilitate in every possible way the prompt delivery of live stock at the said Bourbon stock yards, and the Bourbon Stock Yards Company has erected at great cost ample facilities for the handling at one time of large amounts of stock, and for giving them that peculiar attention which their nature requires, and has provided not only pens and other facilities for ordinary live stock in healthy condition, but has provided entirely separate pens known as "quarantine" pens for live stock coming from those districts which are, by the laws of the United States, required to be kept separate from live stock coming from other districts, all of which has cost large sums of money.

It would greatly disarrange and embarrass the business of the

Louisville & Nashville Railroad Company, and be very bur-
63 densome to it to be compelled to handle live stock for the Louisville market in the manner in which effort is now being made to compel it to do, to wit, deliver the live stock to the Southern Railway Company to be carried to the Central stock yards. As the live-stock business is now done all such live stock coming to the city of Louisville over the lines of the Louisville & Nashville Railroad Company is taken immediately to one place, to wit, its live-stock depot at the Bourbon stock yards. When such live stock comes into the city from the East, and reaches defendant's freight yards in the eastern part of the city, it is then very close to its live-stock depot, to wit, the Bourbon stock yards, and can be quickly and conveniently carried to the same. When such live stock comes to the city from the South, and reaches its freight yards in the southern portion of the city, all of the live stock from such yards can be quickly transported by one switch-engine from said yards at south Louisville to defendant's live-stock depot at the Bourbon stock yards. But if it should be compelled to deliver live stock not only at its live-stock depot, but also to a connection with the Southern railway, it would necessitate handling it in an entirely different manner from that now prevailing. It would be necessary for defendant, when a train containing live stock reaches east Louisville, or south Louisville, to separate the cars containing live stock destined for the Central stock yards from those containing live stock destined for the Bourbon stock yards, which is its live-stock depot, which cars, after being thus separated, would have to be handled by separate engines and crews. If the cars were already in the South Louisville yards then those destined for the Bourbon stock yards would be taken by one switch-engine and carried in a northwestwardly direction over the tracks ordinarily known as the railway transfer tracks to the Bourbon stock yards, while those destined for the Central stock yards would have to be taken by a different engine and crew over different tracks, to wit, the main tracks leading northward towards its passenger and freight depot, until they should reach a connection with the Southern railway at Seventh and Magnolia. And if the cars were all in the East Louisville yards it would be necessary for one engine and crew to take the cars destined for the Bourbon stock yards to the Bourbon stock yards, while a different engine and crew would take the cars destined to the Central stock yards in a southwestwardly direction over the track known as the railway transfer
64 track, to south Louisville, whence another engine and crew would take the same northwardly from south Louisville over defendant's main tracks to a connection with the Southern railway at Seventh and Magnolia.

This method of handling such business would be a great burden upon defendant, and a great interruption of defendant's business. The said main tracks leading from south Louisville to its aforesaid depot and yards near Tenth and Broadway (passing the 7th and Magnolia crossing) are very greatly crowded with traffic even as business is now conducted. As it is now, there is so much traffic over the said tracks between south Louisville and the yards near Tenth and

Broadway, that the switch-engine plying between these two points does not and cannot make special deliveries at side tracks along the way but carries cars without stopping from south Louisville northwardly to the yards near Tenth and Broadway, from which last-mentioned yards special deliveries are made at individual sidings by another switch-engine and crew, where such special deliveries are made at all. But this method of doing business would necessitate too much delay for the proper handling of live stock, and to compel defendant to handle live stock over these tracks with the promptness with which live stock should be properly handled and to make deliveries of same for the Central Stock Yards Company to the Southern railway at Seventh and Magnolia, would, as aforesaid, be a great burden upon defendant, and a very great interruption of its business.

Defendant has not been guilty of any discrimination against plaintiff or any one else. The yards of the Central Stock Yards Company have been constituted the live-stock depot of the Southern Railway Company at Louisville, and this defendant in doing business as it has been doing the same and in refusing to do business as demanded by complainant, has simply insisted upon delivering at its own live-stock depot in the city of Louisville, all live stock brought by it to the city of Louisville, instead of transferring the same to the Southern railway to be delivered at the live-stock depot of the Southern Railway Company.

III.

As to the provisions of the constitution of Kentucky referred to in the amended bill of complaint filed herein, defendant submits that they do not apply to interstate commerce which is the sole subject of the present suit, as such commerce is subject to regulation solely by the Congress of the United States, which has in fact
65 taken action upon the subject and established regulations governing the same, none of which require this defendant to do business as complainant herein seeks to compel it to do.

Wherefore defendant prays to be hence dismissed with its costs.

GIBSON, MARSHAL & GIBSON,
HELM, BRUCE & HELM,
Att'ys for Defendant.

M. H. Smith says he is the president of the defendant, The Louisville & Nashville Railroad Company, and its chief officer, in this State, and that the statements of the foregoing answer are true.

M. H. SMITH.

Subscribed and sworn to before me by M. H. Smith, this 17 day of January, 1902. My commission expires at end of present session of the Kentucky senate.

HUSTON QUIN.
N. P., J. C., Ky.

The affidavit of Walker D. Hines (2) above referred to is as follows:

United States Circuit Court, Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Walker D. Hines, being duly sworn, says: I am the same Walker D. Hines who has heretofore made an affidavit in the above-styled case. I have read the affidavit of Mr. S. A. Stalcup filed herein. While it may be true that the Southern railway in Kentucky, at Louisville, delivers to the Louisville & Nashville railroad at its connection with said railroad system loaded cars of the Southern Railway Company for points on the Louisville & Nashville Railroad Company's lines, yet this is true only to whatever extent the Southern railway finds it to its interest to make such deliveries and it does not make such deliveries when the Southern railway conceives that it
66 is to its interest to refrain from doing so. This is true with respect to live stock loaded at points on its lines and destined to the Bourbon stock yards, at Louisville, Kentucky, provided such live stock originates at points not on or reached via the lines of the Louisville & Nashville railroad and for which the Louisville & Nashville Railroad Company does not compete.

Affiant states that car-load lots of live stock originating at the Bourbon stock yards are not transported constantly or frequently to the point of physical connection with the Southern railway destined to points on the Southern railway in or out of Kentucky; that when such car-loads of live stock are destined to points not on or reached via the lines of the Louisville & Nashville railroad, which is very rarely the case, they are so transported and delivered, but only when cars therefor are furnished by the Southern railway. When live stock is brought into Louisville over the lines of the Southern Railway Company and destined to the Bourbon stock yards, at Louisville, Ky., the Louisville & Nashville Railroad Company has heretofore received said cars from the Southern railway and carried them to the Bourbon stock yards when such cars came from a territory into which the lines of the Louisville & Nashville Railroad Company do not run, in other words, when the cars came from non-competitive points, but never when such cars came from competitive points, that is points at which the Louisville & Nashville Railroad Company itself competed for business. Where such cars of stock came from non-competitive points over the Southern railway, or in fact over any other railway entering the city of Louisville, the Louisville & Nashville Railroad Company was willing to receive such cars of stock from such railroad company and transfer and deliver them to the Bourbon stock yards, which is the live-stock depot for the Louisville & Nashville Railroad Company, because the greater part of live stock which is received at the Bourbon stock yards is bought, not by persons residing in the city of Louisville, but either by or for persons residing elsewhere, so that the live stock after being thus purchased at the Bourbon stock yards is again transported from the city of Louisville to other points, espe-

cially to points north of the Ohio river, and as the Louisville & Nashville R. R. Co. itself has a line of railroad running from Louisville eastwardly to Cincinnati, Ohio, where it has business connections with other lines of railroad going north and east it carries a very large amount of live stock out of the city of Louisville for the East and
67 Northeast, and on which it makes a profit. The result of this is that where live stock is brought to the Bourbon stock yards and there sold there is always a probability of the Louisville & Nashville Railroad Company having an opportunity to carry said stock out of the city of Louisville and to make what profit there is in the handling of such business. In this way the use of its terminal facilities in the city of Louisville in gathering live stock into its live-stock depot, whence it will probably be carried out again by the lines of the Louisville & Nashville Railroad Company, is directly contributory to its regular business as a railroad company, and to the profits of such a business. And for this reason it has been willing, as above stated, to use its terminals in the city of Louisville for the purpose of gathering live stock into the Bourbon stock yards, whether the same came in by one railroad company or another, subject, however, to the qualification above explained, to wit, that it has never received and transferred to the Bourbon stock yards live stock coming to Louisville over the lines of other railroads, when it came from points at which the Louisville & Nashville Railroad Company itself competed for business, as it has never been willing in this way to give the use of its terminal facilities in the city of Louisville to its rivals and competitors in business.

But it has never at any time received from the Southern Railway Company live stock shipped from the Central stock yards except where it has done so under a temporary restraining order granted without notice to it in a case pending in the Jefferson circuit court pending an application for a temporary injunction, and, further, in a few cases where it received such live stock under a misunderstanding by some of its employés, which was quickly corrected.

So as to live stock shipped from the Bourbon stock yards, it has to some extent transferred and delivered such live stock to the Southern railway, when as is very seldom the case, destined for points on the Southerm railway at which the Louisville & Nashville Railroad Co. does not compete for business; but never when destined to points at which the Louisville & Nashville Railroad Company does compete for business. And moreover it has never thus delivered live stock when destined for the station called Central stock yards, Kentucky, except when compelled to do so under order of court. It has never in any manner whatever recognized the said Central stock yards, Kentucky, as a station, to, from or at which it would do business of any kind.

68 The conditions under which, as above explained, it has delivered stock originating at the Bourbon stock yards, to the Southern railway to be carried to distant points outside of the Louisville territory, are wholly different from those under which complainant now seeks to compel the Louisville & Nashville Railroad Company to deliver to the Southern railway for the Central

stock yards live stock originating on the lines of the Louisville & Nashville Railroad Company and destined for the Louisville market. As heretofore explained, the Bourbon stock yards are the regular live-stock depot of the Louisville & Nashville Railroad Company at Louisville, and are situate on its line in the city of Louisville at a point convenient of access both to its lines extending eastwardly from the city of Louisville and those extending southwardly from the city of Louisville. This live-stock depot was created by the Louisville & Nashville Railroad Company and it has expended a large amount of money and gone to a great deal of trouble through the course of many years in establishing and perfecting it, because in this way live-stock business is attracted to the Louisville & Nashville Railroad Company out of which it makes a profit as a carrier. And, as heretofore explained, when live stock is sold at this place and is again taken out of the Louisville market the chances are that it will be taken out by the lines of the Louisville & Nashville Railroad Company, if it is to go to a territory through which those lines run. On the other hand, the Central stock yards, as shown by the affidavit of Mr. T. C. Powell, in this case, have been constituted the live-stock depot of the Southern railway, at Louisville, and have been established and will be operated to a very large extent by persons hostile to the interests of the Louisville & Nashville Railroad Company and for the benefit of rivals and competitors of the Louisville & Nashville Railroad Company.

From this it will be seen that when the Louisville & Nashville Railroad Company brings live stock to the city of Louisville it will, if forced to, deliver the same to the Southern railway to be carried to the live-stock depot of the Southern railway, at Central stock yards, be compelled practically to turn over its business to rivals and competitors, and that, too, at a large additional cost and trouble to itself over and above what would be necessary to deliver the same in the regular course of its own business at its own live-stock depot, at the Bourbon stock yards. But on the other hand, when a live-stock shipment originates at the Bourbon stock yards,
69 and is destined to some point distant from the city of Louisville, on the line of the Southern railway, at which point the Louisville & Nashville Railroad Company does not compete for business, a transfer and delivery of such stock by the Louisville & Nashville Railroad Company from the Bourbon stock yards to the Southern railway, is not against the interest of the Louisville & Nashville Railroad Company, and has heretofore been done voluntarily as a matter of accommodation, though I submit it is something which it could not be required by law to do. The conditions under which the Louisville & Nashville Railroad Company has heretofore delivered to the Southern railway live stock originating at the Bourbon stock yards and destined for points distant from the city of Louisville, on the line of the Southern railway at which the Louisville & Nashville Railroad Company does not compete for business, are wholly different from the conditions under which complainant now demands that the Louisville & Nashville Railroad Company deliver to the live-stock depot of the Southern railway at

Louisville, live stock brought into Louisville by the Louisville & Nashville Railroad Company, and which it prefers and desires, and as I submit, has the right to deliver at its own live-stock depot in the city of Louisville.

Affiant further states that from the point of physical connection between the tracks of the Southern railway and the Louisville & Nashville Railroad Company at Seventh and Magnolia streets to the Central stock yards, by the tracks over which stock must be carried, the distance is at least 2.1 miles, and that the distance from the said point of connection with the Southern railway at Seventh and Magnolia streets to South Louisville the distance is 1.71 miles, making a total of 3.8 miles.

Affiant further states that in the regular course of business the time which would be required between the delivery of a loaded car of stock at Seventh and Magnolia streets to the Southern railway and the return of the empty car to that point after it had been taken to the Central stock yards and unloaded, is much more than one or two hours, and that the time could only be kept down to that low limit by the Southern railway performing a special service with respect to the particular car. It is not true, as stated by Mr. Stalcup, that live stock, if properly handled, would, in the course of business, be delivered from South Louisville by way of the Louisville & Nashville Railroad Company and the Southern railway to Central
70 stock yards in less time than it would be delivered from South Louisville by way of the Louisville & Nashville Railroad Company to the Bourbon stock yards. It may be true that the actual distance by the former route is somewhat less than by the latter, but on the other hand, it would require more handling and changing of engines, which would more than offset in point of time the difference in distance between the two routes. Furthermore, it is not true that the distance from South Louisville to the Bourbon stock yards by way of the Louisville & Nashville Railroad Company's tracks is twice or more than twice the distance from South Louisville to the Central stock yards by way of the Louisville & Nashville Railroad Company's tracks and the Southern Railway Company's tracks. The distance from the South Louisville yards to the Bourbon stock yards, including all of the distance to be traveled in carrying a car of stock from the South Louisville yards to the delivery switch at the Bourbon stock yards is 3.94 miles, whereas the distance from South Louisville yards to the Central stock yards, including all of the distance via the tracks to be traveled, is 3.81 miles.

Affiant further points out that when defendant's car is taken to its own depot at the Bourbon stock yards and there unloaded, it has the car immediately available for further service, whereas when taken to the Central stock yards and there unloaded, defendant has to wait until the car is delivered back to it at the convenience of the Southern railway at Seventh & Magnolia streets, and thence has to perform an entirely distinct switching service for the purpose of taking that car to the Bourbon stock yards or elsewhere for reloading.

Affiant states generally in this connection that its arrangements are and must be made for the prompt and expeditious handling of live stock in large quantities to its own live-stock depot, and that nothing like the same economy of time or in the use of its stock cars can be accomplished with respect to cars to be carried to the Central stock yards except by the performance on its part of a special service, which will be very much more expensive, and by the performance on the part of the Southern railway of a similar special service, which it is not in the power of defendant to compel.

Affiant further states that the whole theory of the prompt and economical management of the railroad business must depend upon so systematizing the business as to handle the maximum number of cars with the minimum motive power, and that this system will necessarily be destroyed if defendant, instead of pursuing its
71 practice of regulating its business with respect to its own depots, must adopt the practice of making deliveries of all of its local business at any and all other depots where the particular interest or caprice of individuals may require deliveries to be made.

As to the statement in the affidavit of Mr. T. C. Powell that communications have been received from certain other railroad companies named by him in regard to the establishment of rates on live stock based on the notice from the Southern railway that it had made the Central stock yards its live-stock depot at Louisville, I, of course know nothing about the correspondence between Mr. Powell and those railroad companies, but I do not know and do not now state that not one of the railroad companies named by him has a live-stock depot on its own line in the city of Louisville, as the Louisville & Nashville Railroad Company has. Affiant denies that it is the universal custom between reputable and solvent railroad companies to make deliveries of car-load lots of freight of any kind without exacting pre-payment of freight charges, and on the contrary says that every railroad company holds itself free to make such exceptions as it thinks proper and as it regards to be in its interest, and that it is not only not the universal custom, but it cannot be said to be at this time the general practice for a railroad company to deliver its cars to other railroad companies, since on account of the present scarcity of cars every company does all it can to keep its own equipment on its own lines.

As to the statement in the affidavit of Mr. W. A. Evans, that during the 22 years during which he was in the service of the Bourbon stock yards at Louisville there was much complaint by shippers of delay in having deliveries made of their stock at the Bourbon stock yards, I, of course, am not able to respond specifically, for I do not know to what cases Mr. Evans refers: It is probably true that during these 22 years there were such complaints as there are, and always will be, as to the conduct of everything conducted by human agencies; but I do know and state that the delivery of stock by the Louisville & Nashville Railroad Company at the Bourbon stock yards, has been promptly and efficiently done, and the complaints against its methods of handling the same have been no more than

would have been naturally expected from the conduct of any well-regulated and well-conducted business, and no more than doubtless will be made concerning the deliveries of live stock at the Central stock yards.

72 Affiant states that defendant has as its duty and right and as a practical necessity established a convenient and commodious live-stock depot in the city of Louisville which fully accommodates all the live-stock business from Louisville and all live-stock business coming to Louisville either for local disposition or reshipment. That the Central stock yards is simply an additional establishment for the exclusive purpose of accommodating exactly the same character of business, *i. e.*, live stock for sale locally at Louisville and live stock for shipment or reshipment from Louisville; that the sole purpose of this litigation is to interfere with the natural and orderly handling of the live-stock business by defendant through the medium of its own live-stock depot maintained therefor and to require of defendant expensive and interfering special services for the pecuniary profit of certain capitalists who have invested in the Central stock yards and in the interest of the Southern railway, all of which will be directly at the expense of the legitimate interests of this defendant as above set forth.

WALKER D. HINES.

Subscribed and sworn to before me by Walker D. Hines this 17th day of January, 1902. Commission expires at end of present session of senate.

E. C. TURNER,
N. P., J. C., Ky.

The affidavits of M. H. Smith and M. J. Reedy above referred to are as follows:

United States Circuit Court, Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Milton H. Smith states he is president of the Louisville & Nashville Railroad Company. That he had two interviews with B. H. Hurt, one on December 13th, 1900, relative to the establishment

73 by Mr. Hurt of a new stock yard just outside the city limits of Louisville, Ky. That at one of the interviews, after Mr. Hurt had stated that he proposed to erect a modern, up-to-date stock yard, he was advised by affiant that the Louisville & Nashville Railroad Company had, by contract with the Bourbon Stock Yards Company, made the yards of the latter company its live-stock depot in Louisville, Ky., and would not switch stock for delivery to or shipment from the proposed new stock yard. Whereupon Mr. Hurt stated that it would be no violation of the contract with the Bourbon stock yards because the new yard would be outside of the city of Louisville. In response to which affiant stated to Mr. Hurt

that that was a mere subterfuge and that the Louisville & Nashville Railroad Company would continue to treat the Bourbon stock yards as its exclusive live-stock depot.

M. H. SMITH.

Subscribed and sworn to before me this 17th day of January, 1902. Commission expires at end of present session of senate.

E. C. TURNER,
N. P., Jeff. Co., Ky.

M. J. Reedy states that he is the secretary of Mr. M. H. Smith, president of the Louisville & Nashville Railroad Company. That he has read the foregoing affidavit of Mr. M. H. Smith, distinctly recalls the interviews in question, and that the statements contained in Mr. Smith's affidavit are true.

M. J. REEDY.

Subscribed and sworn to before me, this 17th day of January, 1902. Commission expires at end of present session of senate.

E. C. TURNER,
N. P., Jeff. Co., Ky.

And on another day of said term, to wit: on the 18th day of January, 1902, came the parties, by counsel. The defendant filed the affidavit of C. R. Brent herein. The complainant filed a blank printed form of a live-stock contract. And the cause having been heard on complainant's motion for a preliminary injunction, was submitted and the court not being sufficiently advised took time.

74 At the hearing on said motion complainant read its bill of complaint, and amended bill of complaint, and the affidavits of the following-named parties, and all exhibits therewith, viz: B. H. Hurt, T. C. Powell, S. A. Stalcup, J. W. Byrne, J. E. Miller, W. A. Evans, R. C. Watkins, and a blank printed form of a live-stock contract.

And the defendant read upon said hearing its answer, and the affidavits and exhibits therewith of the following-named parties, viz: Walker D. Hines (two affidavits), M. H. Smith and M. J. Reedy and C. R. Brent.

The affidavit of C. R. Brent above referred to is as follows:

United States Circuit Court, Western District of Kentucky.

CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

C. R. Brent, being duly sworn, says: I am the assistant general freight agent of the Louisville & Nashville Railroad Company. Mr. D. M. Goodwin, the general freight agent, is absent from the city of Louisville. My attention has just been called to a statement in the affidavit of Mr. R. C. Watkins, to the effect that the Louisville & Nashville Railroad Company just prior to the opening of the

Central stock yards notified the Illinois Central Railroad Company that it would switch all stock coming into Louisville over the line of the Illinois Central, and that it is now switching stock coming from Hopkinsville, Ky., and from Memphis, Tenn., both of which are competitive points between the Louisville & Nashville and the Illinois Central Railroad Company.

I keep myself posted with general notices and rules of the office of the character above alleged, and I have never heard of any such notice to the Illinois Central Railroad Company or any other railroad company entering Louisville as is above referred to. Furthermore, I have examined the records of the office and can find no such notice. I am entirely satisfied that none such was given.

75 Furthermore, my own special duties call my attention specially to the matters of switching and transferring cars in the city of Louisville, a matter which is directed from the general freight office, and I can and do say that if any cars have been switched from the Illinois Central railroad to the Bourbon stock yards, coming from Hopkinsville or Memphis, or any other competitive point on the line of the Illinois Central Railroad Company it has been done without authority by those who did the actual work, and without the knowledge of the superior officers of the company having charge of such matters. I have never heard of its being done at all, and I am satisfied that the statement on that subject by Mr. Watkins is a mistake.

C. R. BRENT.

Subscribed and sworn to before me by Mr. C. R. Brent, this 18th day of January, 1902. My commission expires at end of present session of Ky. senate.

HUSTON QUIN,
N. P., J., C., Ky.

The blank printed form above referred to is as follows: (☞ See yellow insert opposite.)

And on another day of said term of said court, to wit: on the 23rd day of January, 1902, came the complainant, by Dodd & Dodd and W. M. Smith, its counsel. Came also the defendant, by Helm, Bruce & Helm, its counsel. The court being now fully advised of the complainant's motion for a temporary injunction herein, delivered a written opinion, which is ordered to be filed, and in accordance therewith, it is ordered, adjudged and decreed that said motion be, and the same is, hereby overruled.

76 The opinion above referred to is as follows:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

United States Circuit Court, Western District of Kentucky.

CENTRAL STOCK YARDS CO., Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Opinion.

The complainant, The Central Stock Yards Co., has very recently established a large and expensive plant for the conduct of its business. It is located on the line of the Southern Railway Co., just outside of the limits of the city of Louisville. Some twelve or more years ago the Louisville & Nashville Railroad Co., having no adequate depot facilities for handling live freight, entered into a contract with the Bourbon Stock Yards Co. (the plant of which was located within the city limits) under which that stock yards company was to erect, and it did erect, and provide at large expense a depot for the defendant for receiving, loading and unloading and shipping live stock, and in consideration of what was done and expended by the Bourbon Stock Yards Co., the defendant agreed that the depot thus provided should be and should continue to be its only live-stock depot in the city of Louisville, and accordingly it has been such ever since, and is now. There is a physical connection between the tracks of the defendant and those of the Southern Railway Co., in the city, and other frieght in car-load lots, by arrangement between the two companies, is interchanged between them within the city limits. The situation being thus, about the time this bill was filed certain car-loads of cattle designed for sale at complainant's yards were shipped to Louisville from States other than Kentucky, and the defendant refused either to bill the freight to the complainant at the Central stock yards, Kentucky, or otherwise than to Louisville simply, and refused to deliver it to the consignee at any other place in the city except at its live-stock depot at the Bourbon stock yards, and refused to deliver it to the Southern Railway Co. at any of the points of physical connection of the two roads, although a demand for all the things thus refused was made
77 upon the defendant by the complainant and also by the shippers of the freight. Whereupon this suit in equity was brought to compel the defendant, by means of a mandatory injunction, to do all the things just mentioned, the claim to the relief thus sought being avowedly based upon the provisions of section 3 of the interstate-commerce act as possibly aided by the provisions of the constitution of Kentucky.

The bill attempts to show the very great injury that would be inflicted upon the complainant if the defendant is not compelled to bill and ship such freight to the complainant direct and to deliver it at points of physical contact in Louisville to the Southern Railway Co., to be transported by it to the complainant's yards. The evidence offered by the complainant was designed more explicitly to show the injury and the details of it which would result to the complainant if the defendant is not compelled to obey the provisions

of the interstate-commerce act, which, it is insisted, are being violated and disregarded by the defendant.

Upon filing the bill the complainant moved the court for an injunction *pendente lite* as prayed for therein, and the court appreciates the importance, to all the parties who are concerned in the litigation, of the very interesting questions which have thus arisen, but the view the court takes of them, particularly at this hearing, makes it unnecessary to state more than one or two of the various grounds upon which the defendant resists the motion.

No demurrer to the bill of complaint has been filed. The defendant has answered, and that pleading has been read as an affidavit on the hearing of the pending motion.

The first inquiry that always presents itself at the outset of every case in the courts of the United States is, has jurisdiction been shown? And this inquiry in this case divides itself into two questions, first, has the court jurisdiction over the subject-matter of the action; and, second, if so, does it come within its equitable powers? The diverse citizenship of the parties to this litigation appears upon the face of the bill, though that is immaterial if the right claimed is founded upon a law of the United States, but does it appear from the bill that equity has jurisdiction of the case as presented by the actual facts stated in that pleading? This inquiry would have to be answered in the negative if other exclusive remedies are provided by law. I do not say that it is impossible to present a state of case
where an injunction might not lie to enforce rights created
78 under the interstate-commerce act, but on the facts stated in
this particular bill of complaint is this such a case? The Supreme Court in the case of Wisconsin, etc., R. R. *v.* Jacobson, 179 U. S., at page 296, used this language:

"At common law the court would be without power to make such an order as was made in this case by the State court. Legislative authority would be necessary in order to give power to the court to render a judgment of this kind." This language would, I think, aptly apply to the orders asked to be made in this case. The rights created by section 3 of the interstate-commerce act did not exist at common law, and the legislation which was necessary to create them can only be found in that act. That legislation seems to have been the sole origin of the rights now sought to be enforced. While some reliance seems to be placed upon the provisions of the Kentucky constitution, I can see no material difference between what that constitution does and what the interstate-commerce act does. This suit, at all events seems to have been brought to enforce the rights, if any, conferred upon the complainant by the congressional legislation referred to, and this raises the very important jurisdictional question that presents itself, *in limine*. Section 3 of the interstate-commerce act is in this language:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of

traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Sections 8 and 9 of the act are as follows:

"SEC. 8. That in case any common carrier subject to the
79 provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

It will thus appear that Congress has not only created a new right by section 3 of the act—a right which did not exist at common law nor by any previous congressional enactment—but has also by the same act expressly provided remedies to protect and enforce that right by sections 8 and 9. Are not those remedies thus provided exclusive of all others? The court is strongly inclined to believe

that this question must be answered in the affirmative upon the very explicit language found in the opinions in the following cases:

Haycroft *v.* United States, 22 Wall. 98.
Farmers', etc., Bank *v.* Dearing, 91 U. S. 35.
Barnett *v.* National Bank, 98 U. S. 555.
Carter *v.* Carusi, 112 U. S. 483.
80 East Tennessee R. R. Co. *v.* The Telegraph Co. 122 U. S. 306.
McBroom *v.* Scottish Co., 153 U. S. 325.

The proposition is probably most clearly stated in the following language from 22 Wall. 98:

"But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. That remedy was the only one — which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

Are not the courts, in a case such as is presented by this bill, bound to hold that the remedies provided by sections 8 and 9 of the act for violation of rights bestowed by section 3 of the act are as adequate and efficient as Congress chose to provide in connection with the rights it created, and if this be true, is not the complainant limited to the two remedies provided by section 9 of the act, one of which is an action at law for damages and the other is an application to the Interstate Commerce Commission. Why are these remedies not adequate and efficient, and if we should think not, then why is not the judgment of Congress conclusive upon the courts? (See extract above quoted from 22 Wall. 98.) It is true that Judge Hammond, in the case of The Little Rock, etc., Co. *v.* East Tennessee, etc., Co., 47 Fed. Rep., pp. 773–'4, expressed a contrary opinion, even while observing that it was not necessary to pass upon the question. He said, however, that he based his opinion upon that of Judge Jackson, in the case of The Kentucky & Indiana Bridge Co. *v.* Louisville & Nashville R. R. Co., 37 Fed. Rep. 567. But the case then before Judge Jackson was one which not only did not call for the decision of the question, but one in which it does not seem to have been decided at all. On the contrary, that was a case brought to
81 enforce orders of the Interstate Commerce Commission and was based upon section 16 of the interstate-commerce act, thus invoking a remedy expressly provided for by that section of the act itself. The court is referred also to the case of The Interstate Stock Yards Co. *v.* The Railway Co., 99 Fed. Rep. 483, where, it is true, an injunction was granted upon facts somewhat similar to those stated in this case, but the question to which I have alluded was not mooted in that case, and, therefore, not decided by Judge

Baker, and the element of contract between the parties may have been and probably was the controlling factor in the conclusion he reached. In what we may call the Arthur cases, decided by Judge Taft, there was the element of conspiracy to injure as a principal ground of relief, and it does not appear that those cases turned upon the question we are considering.

It seems quite clear when we consider the scheme and purpose of the interstate-commerce act, that there was good reason for Congress to limit the remedies provided by the act. For any violation of the rights of any person as fixed and created by the 3rd section of the act, he might sue at law for the damages, or if the question were a broader one than could be adequately settled in such an action, then an application could be made to the commission created by the act and which was clothed with powers specially adapted to the investigation of such questions. It is only when a ruling has been made by that commission that the powers of a court of equity can, under the act, be invoked for the enforcement of such ruling if the carrier refuses to comply with it. This course is definitely provided for by section 16 of the act. It will thus, it seems to the court, be clearly seen that the fullest, and in the judgment of Congress, the most appropriate remedies were provided for the protection of the rights created under section 3 of the act, viz: First, a suit at law; cond, an application to the Interstate Commerce Commission; and, third, a suit in equity to enforce any ruling of the commission upon such application, and this latter contingency is the only one that authorizes equitable interference unless we ignore the legislation of Congress and appeal to some higher law. Congress alone had power to create the right and to provide the remedies for its vindication. Its action upon the subject can neither be changed nor enlarged by the courts. It was final.

But if we find ourselves safely past these questions then others of equal doubt and difficulty present themselves upon the issues tendered by the defendant. What are the rights of the respective
82 parties to this litigation? As to part of the relief sought one important question is: Can the court compel the defendant carrier to issue bills of lading to points on connecting lines when the defendant itself does not, in the conduct of its business, deem it wise or proper or just to itself to do so? Under the authority of cases like The Little Rock R. R. Co. *v.* St. Louis, etc., R. R. Co., 63 Fed. Rep. 775, it would seem that this question ought to be answered in the negative. Another important inquiry, looking at the case from the standpoint of the defendant is this: What effect on this case must be conceded to rulings like those in the cases of The Covington, etc., Co. *v.* Keith, 139 U. S. 128, and Butchers' and Drovers' Stock Yards *v.* L. & N. R. R. Co., 67 Fed. Rep. 41, which were much like the one now before us, and wherein the courts held that a railroad company was not bound to maintain more than one live-stock depot in a city, nor to make delivery of such freight, when consigned to such city, at more than one live-stock depot.

On the other hand, section 3 of the interstate-commerce act was no doubt intended to subserve a wise and beneficent public purpose,

especially in prohibiting a carrier from subjecting any particular corporation or person to any undue or unreasonable prejudice or disadvantage whatever, and in requiring such carrier to afford all reasonable proper and equal facilities for the interchange of traffic with connecting lines where such facilities do not require any carrier to give the use of its tracks or terminal facilities to another carrier engaged in the same business. The two first of these clauses of the act are appealed to by the complainant, but the defendant insists that the complainant's demands would compel it to give to a rival the use and benefit of its tracks and terminals in the city of Louisville. It may be that the carrier in this case, being a creature of law for the public benefit in large measure, might by a proper proceeding be compelled to do many of the things demanded of it in this action, but it is a proper and well-settled rule that the chancellor should not grant a preliminary injunction unless the case is practically free from serious doubt, especially where defenses are set up.

Paine *v.* U. S. Playing Card Co., 90 Fed. Rep. 543.
Kilburn *v.* Ingersoll, 67 Fed. Rep. 46.
Home Ins. Co. *v.* Nobles, 63 Fed. Rep. 642.

83 It seems to the court in this case that there are too many doubts as to the propriety of the remedy invoked in this litigation and as to the rights of the respective parties to the suit to warrant any such prejudgment as would be involved in the granting of a preliminary injunction. Such questions, therefore, should all be referred to the final hearing of the cause when they can be determined, not upon *ex parte* affidavits, but after a full examination and cross-examination of the witnesses.

Whatever may be the ultimate result, the motion for a temporary injunction is denied and overruled.

Jan. 23, 1902.

WALTER EVANS, *Judge.*

And on another day of said term of said court, to wit, on the 24th day of January, 1902, came again the parties complainant and defendant by their respective counsel of record, and it now appearing to the court that it has not jurisdiction in equity of the matters alleged in the bill of complaint herein, upon consideration thereof, it is now, therefore, by the court ordered, adjudged and decreed that the complainant's bill be and it is now dismissed, but without prejudice to the complainant's right to pursue any other remedies it may have upon the matters alleged by it, to all of which the complainant excepts.

It is further ordered, adjudged and decreed that the defendant have and recover of the complainant its costs herein expended, to be taxed by the clerk, and it may have execution therefor, to all of which the complainant excepts.

Upon the motion of complainant, Central Stock Yards Company, by counsel, and on the filing of its petition for an order allowing an appeal, together with its assignment of errors, it is now ordered by

the court that pursuant to the said petition an appeal be and the same is hereby allowed and granted to the said Central Stock Yards Company from the decree herein complained of in the said petition to the United States circuit court of appeals, for the sixth circuit, and that the amount of the bond upon said appeal be and is hereby fixed at the sum of $250.00.

Thereupon the said complainant, Central Stock Yards Company, tendered its bond with the Ætna Indemnity Company as surety, which said bond after being examined was approved by the court.

84 The petition for an appeal above referred to is as follows:

Circuit Court of the United States for the Western Division of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition of Complainant for an Appeal.

Now, comes the complainants Central Stock Yards Company, by its counsel, and conceiving itself to be aggrieved by the decree of the court entered in the above-entitled cause, on the 24th day of January, 1902, whereby it was ordered and decreed that the complainant's bill of complaint herein be dismissed with costs, petitions the court for an order allowing the said complainant, Central Stock Yards Company, to prosecute an appeal from the said decree to the honorable United States circuit court of appeals for the sixth circuit, under and according to the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which the said complainant shall give and furnish upon such appeal, and that upon the giving of such appeal bond the same be examined and approved by this honorable court and made a part of the record herein. And your petitioner will ever pray.

W. M. SMITH,
DODD & DODD,
Attorneys for Complainant.

Appeal allowed and bond fixed at $250.00.

WALTER EVANS, *Judge.*

85 The assignment of errors above referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Complainant's Assignment of Errors.

Now comes the complainant, Central Stock Yards Company, and files the following assignment of errors on which it will rely upon its appeal from a decree made by this honorable court on the 24th day of January, 1902, dismissing the bill of complaint herein. The said complainant assigns as errors to be relied on by it upon this appeal from the said decree the following:

I.

The said court erred in deciding that complainant's remedy at law was adequate, and that its bill was without equity.

II.

The said court erred in dismissing the complainant's bill of complaint on the ground that sitting as a court of equity the said court had no jurisdiction to entertain the said bill or to grant the relief therein prayed for.

III.

The said court erred in deciding that before it, sitting as a court of equity, could grant any relief to the complainant, the complainant must first apply for and obtain an award in its favor from the Interstate Commerce Commission, and could then for the first time be allowed any standing in a court of equity and only for the purpose of enforcing said award.

IV.

The said court erred in dismissing the said bill of complaint and adjudging the costs of this suit in favor of the defendant against the said complainant.

86

V.

The said court erred in refusing to grant the relief accordingly as prayed and moved for by the complainant.

Wherefore, the said complainant, Central Stock Yards Company, prays that the foregoing be filed as its assignment of errors, and that upon the hearing hereof in the said circuit court of appeals for the sixth circuit, the said decree be reviewed and reversed with costs, and as in duty bound the said complainant will ever pray.

W. M. SMITH,
DODD & DODD,
Attorneys for Complainant.

The above bond referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Bond of Complainant on Appeal.

Know all men by these presents, that we, the complainant, Central Stock Yards Company, as principal, and The Ætna Indemnity Company, as surety, are joint- and severally held and firmly bound unto the above-named Louisville & Nashville Railroad Company in the sum of $250.00 lawful money of the United States of America, to be paid to the said Louisville & Nashville Railroad Company, its successors and assigns, for which payment well and truly to be made we bind ourselves, all and each of our heirs and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 24th day of January, one thousand nine hundred and two.

The condition of the above obligation is such that whereas the said Central Stock Yards Co. has taken an appeal to the United States circuit court of appeals for the sixth circuit for review of the decree rendered and entered by the said circuit court of the United States for the western district of Kentucky, sitting at Louis-
87 ville, which decree was entered in the above-styled suit on January 24th, 1902.

Now, therefore, the condition of the above obligation is such that if the above-named Central Stock Yards Company, complainant in the said suit, and appellant on the said appeal, shall prosecute the said appeal to effect and answer all damages and cost if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] THE CENTRAL STOCK YARDS COMPANY,
By B. H. HURT, *President.*
THE ÆTNA INDEMNITY COMPANY,
By ALEXANDER GILMOUR,
Attorney-in-fact.

Examined and approved.
WALTER EVANS, *Judge.*

WESTERN DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States, for the western district of Kentucky, at Louisville, do hereby certify that the foregoing 94 pages contain a true and correct transcript of the record and proceedings in the case of Central Stock Yards

Company *vs.* Louisville & Nashville Railroad Company, No. 6903, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 28th day of January, A. D. 1902.

[SEAL.]

THOS. SPEED, *Clerk.*

Circuit Court of the United States for the Western District of Kentucky.

THE CENTRAL STOCK YARDS COMPANY, Complainant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Citation.

The President of the United States of America to the Louisville & Nashville Railroad Company, Greeting:

You are hereby cited and admonished to appear at the United States circuit court of appeals for the sixth circuit, to be held
88 at the city of Cincinnati in the State of Ohio, on Tuesday the 4th day of February, 1902, pursuant to an appeal this day granted by the circuit court of the United States for the western district of Kentucky, wherein The Central Stock Yards Company is appellant, and you are appellee, to show cause, if any there be, why the judgment or decree, in the said appeal mentioned dismissing the complainant's bill of complaint with costs, should not be corrected, revised and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 24th day of January, 1902, and of the Independence of the United States 126.

[L. S.]

WALTER EVANS, *Judge.*

Received at Louisville, Ky., Jan. 24th, 1902, executed the within citation on the Louisville and Nashville R. R. Co., by delivering a true copy hereof to Milton H. Smith, president of the Louisville & Nashville R. R. Co., at his office in Louisville, Ky.

This Jan. 28th, 1902.

A. D. JAMES,
U. S. Marshal,
By W. A. BLACKBURN,
Chief Deputy.

Fees	
Exp	$2 00
	10
	$2 10

No. 1070. Citation. Filed Feb'y 1, 1902. Frank O. Loveland, cl'k.

89 And afterwards to wit on February 3rd, 1902 præcipe for appearance of counsel was filed which reads and is as follows:

Præcipe for Appearance.

United States Circuit Court of Appeals for the Sixth Circuit.
October Term, 1901.

CENTRAL STOCK YARDS CO.
vs.
LOUISVILLE & NASHVILLE R. R. Co. } No. 1070.

To the clerk of said court:

Please enter *my* appearance as counsel for the appellant.

J. C. DODD.
W. M. SMITH.
JOHN L. DODD.

☞NOTE.—Must be signed by a member of the bar of Supreme Court of the United States or of any circuit court of the United States, and by individual (not firm) name.

90 And afterwards to wit on April 8th 1902, an order was entered in this cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
L. & N. RAILROAD CO.

A motion to advance this cause for hearing is submitted by appellant's counsel Mr. W. M. Smith.

And afterwards to wit on April 14th 1902, an order advancing said cause was entered which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
L. & N. R. R. Co.

This cause is advanced to be heard May 15th proximo.

And afterwards to wit on May 15th 1902 an order was entered in said cause which is in the words and figures as follows:

91 United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
LOUISVILLE & NASHVILLE R. R. Co. } Before Lurton, Day, & Severens, JJ.

This cause is argued for appellant by Mr. J. C. Dodd and for appellee by Mr. Helm Bruce and is continued until tomorrow at 9.30 a. m.

And afterwards to wit on May 16th, 1902 an order was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
LOUISVILLE & NASHVILLE R. R. Co.

This cause is further argued for appellee by Mr. Helm Bruce and Mr. Ed Baxter and for appellant by Mr. W. M. Smith and is submitted to the court.

And afterwards to wit on July 8th 1902 a decree was entered in said cause which reads and is as follows:

Decree.

92 United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
vs.
LOUISVILLE & NASHVILLE R. R. Co. } No. 1070.

Appeal from the circuit court of the United States for the western district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby affirmed with costs.

93 And afterwards to wit on July 30th 1902 an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

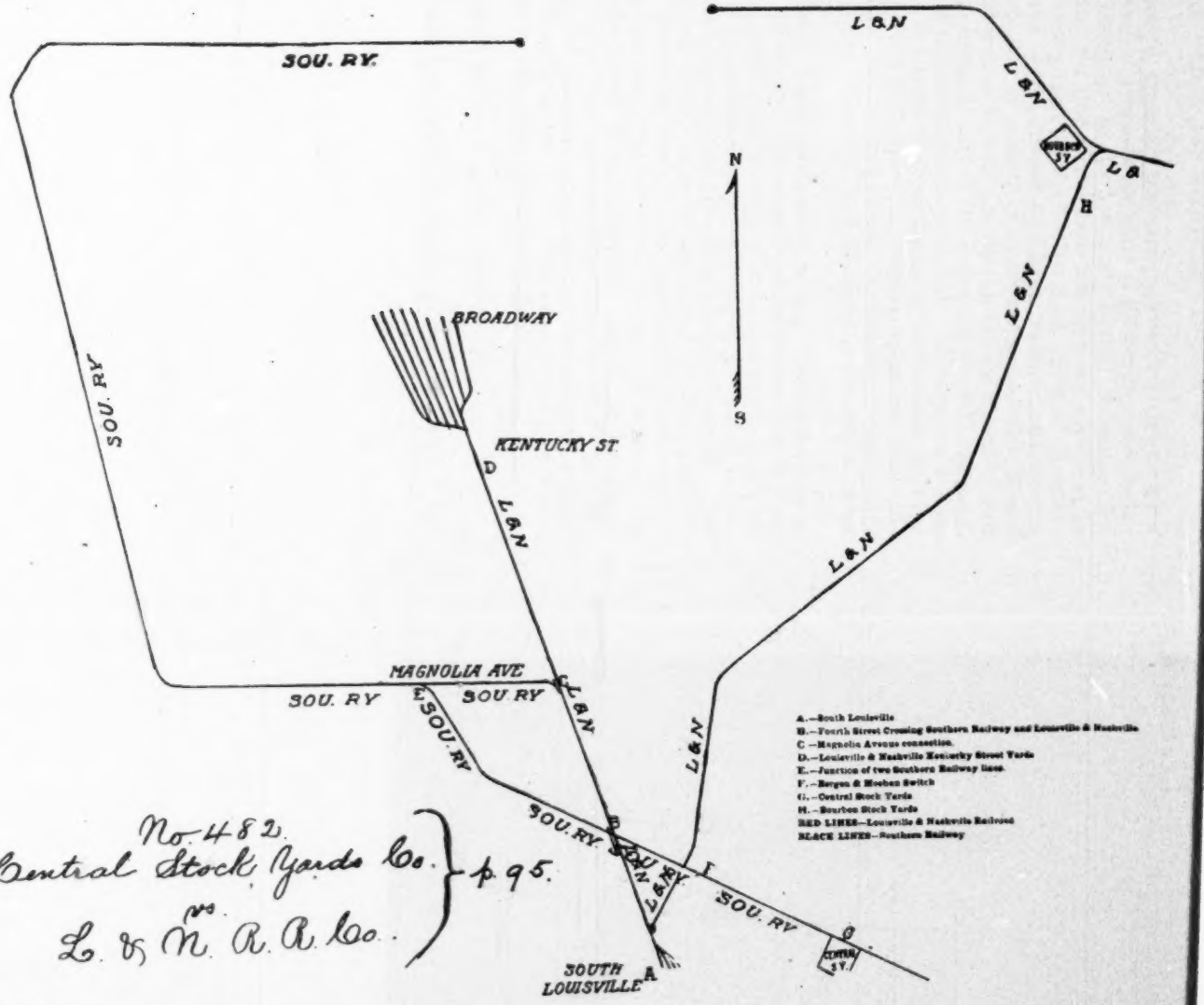
94 United States Circuit Court of Appeals, Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company, Appellee. } No. 1070. Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Submitted May 16, 1902; decided July 8, 1902.

Before Lurton, Day, and Severens, circuit judges.

This — a bill filed by the stock yards company against the railroad company seeking a mandatory injunction requiring the railroad



No. 482.
Central Stock Yards Co. } $.95.
vs.
L. & N. R. R. Co.

company to receive, transfer, transport and deliver shipments of live stock tendered to it outside the State of Kentucky, consigned or tendered to be consigned to any points of physical connection between its line and the line of the Southern Railway Company in Kentucky; and designated for the Central stock yards or its station in Kentucky; and in like manner to deliver, transport and transfer such consignment to any person to whom it may be billed at said stock yards; and further to recognize the right of the consignor and the consignee to change at any of the stations of the said company, the destination of said shipment, so as to make delivery in the manner agreed upon at a point of physical connection between the lines of the Southern Railway Company and the Louisville and Nashville Railway Company for delivery to said Central stock yards; also seeking a temporary injunction and damages in the sum of three thousand dollars.

The Central Stock Yards Company is a duly organized corporation authorized to conduct a general business in the State of Kentucky. The Louisville and Nashville railroad operates in the States of Kentucky, Tennessee, Alabama, Georgia, Mississippi, Louisi-
94½ ana, Florida, Indiana and Illinois as a common carrier. The Central Stock Yards Company has located its plant just outside the city of Louisville where it has facilities for receiving, unloading, feeding and caring for live stock. This plant is about nine miles from the terminus of the Southern railroad in the city of Louisville. It is further alleged that the Southern Railway Company has established a station, known as the "Central stock yards," at or near the location of the plant. The situation may be shown in a general way by the rough draft herewith shown.

(Here follows diagram marked p. 95.)

96 The points of physical connection between the lines of the Southern Railway Company and the lines of the defendant are shown at F, B and C of the diagram. The defendant company refused to receive stock from points outside the State of Kentucky, billed to the Central Stock Yards Company or to any person in its care, asserting the right to deliver all live stock designated for Louisville passing over its own lines, at the Bourbon stock yards, shown on the map at H, with which company the defendant has a contract, the Louisville and Nashville Railway Company agreeing that it would not lease, rent or sell within the city of Louisville for the establishment of any other stock yards, or establish any other stock yards within or adjacent to said city. That it will deliver, and cause to be delivered, so far as it legally may, all live stock shipped over the lines of the defendant company consigned to the city of Louisville; and will load all stock for other persons at said city at said yards, providing that if the terms of such agreement should be invalidated by any judgment or order of the court, or by legislative requirement, then the stock yards company should have no claims for damages against the railroad company arising out of the terms of the contract.

The Central Stock Yards Company is a corporation, and was established by an agreement with the Southern Railway Company, making it the stock yards of that company in Louisville and vicinity. It is claimed that the complainant has a right to compel the shipment of live stock and transfer of cars consigned to the Central Stock Yards Company at one of the points of physical connection with the Southern railway upon there grounds:

(1.) That such is the legal duty of the defendant company as a common carrier.

(2.) Because of the requirements of the act to regulate commerce, passed by the Congress of the United States on February 4th, 1887, known as the "interstate-commerce act."

(3.) By amended bill, that such is the duty of the corporation under the constitution and laws of the State of Kentucky.

The circuit court dismissed the application for a temporary injunction, and afterwards dismissed the bill for want of jurisdiction in equity. Complainants appeal.

DAY, *J.*, delivered the opinion of the court.

The discussion in this case has taken a wide range. In our
97 opinion it may be disposed in the solution of a few leading propositions, the first being, is there a right independent of a statute, to require the railroad company to receive the live stock for shipment to the Central stock yards and to deliver the cars at a point of connection with the Southern railroad in Louisville for transportation thereto.

It is apparent from a consideration of the testimony that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company. It is true the location is just beyond the city limits, but the business to be transacted is the Louisville business in the sale and forwarding of stock in these yards. The contract through which the Central stock yards originated is in the record, and there we find an agreement between the Southern Railway Company and the Central Stock Yards Company in which is recited the desire of the railroad company to establish a general stock depot "for the receiving and delivery of stock at Louisville, Kentucky." After stipulations as to the reception and care of the stock, it is further provided that the railroad company will establish the premises of the stock yards company as its stock depot for the purpose of handling live stock to and from Louisville, and agrees not to sell, lease or use or license to be used any part of its ground in or adjacent to Louisville for the establishment of any other stock yards, or otherwise facilitate the establishment of any other stock yards in the city, and will establish no other stock-yards depot at or near said city. The railroad company further agrees to establish Louisville rates to and from the premises of the said company on certain lines. It is apparent from these stipulations of the contract that the parties understood that the Central stock yards was intended to be, as in fact it is, a Louisville stock yards, to be used, as is recited in the contract, in building up the live-stock business to and from Louisville. We have no question that the Central stock yard is as distinctly a

yard for the transaction of the business of receiving, keeping and selling of stock at Louisville as is the Bourbon stock yards, established for the same purpose by contract with the defendant company. The question on this branch of the case is thus narrowed to the consideration of the rights of the complainant to require of the Louisville and Nashville Railway Company shipments and transfers to the Central Stock Yards Company over the connection with the Southern railroad, of live stock whose destination is Louisville. The peculiar duties of a common carrier of live stock are pointed out by Mr. Justice Field in North Penn R. R. Co. *v.* Commercial Bank of Chicago, 123 U.
98 S., 727. The animals cannot be turned loose or left without food or shelter in cars standing on the railroad tracks or sidings. They must be placed in suitable quarters where they can be fed and cared for under the charge of competent agents. The nature of the property requires these services, essential to the discharge of the duty of the carrier in the safe transportation and delivery of live stock. For this purpose it is the duty of the carrier to make provision by suitable yards and proper equipment and competent persons to manage and control the care and delivery of the live stock. We perceive no reason why this duty cannot be discharged by contract with proper persons or companies who shall undertake the same under the responsibility of the carrier. Such a contract was enforced in Terre Haute R. R. Co. *v.* Struber, 109 U. S., 381. Justice Harlan observed in Stock Yards Company *v.* Keith, 139 U. S., 128–'36:

"It did not concern them (the complainants) whether the railroad company duly maintained stock yards or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under the obligation to the public to provide."

There is no showing of the inadequacy of the Bourbon Stock Yards Company in the matter of accommodations for receiving and caring for cattle. The defendant has there made provisions ample for the care of such stock with a company obligated to discharge the duties in this behalf required by the law of common carriers. Is the defendant obliged by law to make Louisville delivery at other points by making connections for other Louisville stock yards? We think this question must be answered in the negative. In all intents it was so answered by this court in Butchers' and Drovers' Stock Yards Company *v.* Louisville and Nashville Railway Company, 67 Federal, 35. In that case the railroad company had entered into a contract with the Union Stock Yards Company which made it the stock-yards depot of the Louisville and Nashville Railway Company at Nashville. A spur track had been run down Front street in Nashville for the accommodation of freight shippers not handling live stock. About forty feet from this track the Butchers' and Drovers' Company established an independent stock yards. The Butchers' and Drovers' Company sought a mandatory injunction to compel the railroad company to build or allow to be built, a side track connecting the spur track with the complainant's stock yards,

there to deliver and receive cattle consigned or shipped by
99 the complainant. The obtaining of the right of way and the expense of building the side track were not required of the defendant company and are not elements essential to the disposition of the case in the opinion rendered by Judge Taft. The contention of the railroad company, that, having established a live-stock depot in Nashville, for the reception and delivery of stock in that city, it could not be compelled to receive and deliver from another depot in the city, was sustained. Judge Taft quotes from the opinion of Judge Harlan in Stock Yards Company v. Keith, 139 U. S., 128, as follows:

"We must not be understood as holding that the railroad company in this case was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling or shipping live stock choose to establish yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellant are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignors of live stock; and, if the appellee had been permitted to use them without extra charge for mere 'yardage,' they would have been without just grounds of complaint in that regard, for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receivers to receive and to deliver live stock from and to the appellees at their stock yards in the immediate vicinity of the appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation."

We think this language is no less applicable to the case under consideration. The Louisville and Nashville Railway Company has by contract arranged for the discharge of its duties to shippers
of live stock at the Bourbon stock yards. The proof does not
100 show that these accommodations are inadequate or the charges illegal. It would doubtless be convenient and promote the business of dealers and shippers if other facilities were afforded, but we find in the law, nothing aside from a positive statute, that requires more ample provision at the hands of the respondent.

It is further alleged in the bill that the refusal to make the desired shipping and transfer of stock to the yards of the complainant is a violation of section three of the interstate-commerce act, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give undue or unreasonable preference or advantage to any particular person, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their respective lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The claim is that, having granted certain rights and privileges to the Bourbon Stock Yards Company, this section guarantees equal privileges to the Central Stock Yards Company. This construction of the act is not sustainable. It is the duty of the railroad company to provide reasonable facilities for the unloading and care of live stock. This duty it might discharge by itself furnishing sufficient facilities, or it might contract with others to make such provision. The respondent has chosen the latter course. By contract with the Bourbon Stock Yards Company it has provided facilities for the care of stock received at Louisville. These facilities cannot be denied to some and afforded to others. But this is far from saying that it was the purpose of the law to dictate to common carriers the means by which it shall discharge its obligations to shippers. To hold otherwise would be, having regard to the present case, to require the railroad company to make connections with as many stock yards companies as may see fit to provide facilities equal
101 to those furnished by the company or its agents. This would be carrying the act far beyond its terms and purposes. Kentucky and I. Bridge Co. *v.* Louisville and N. R. R., 37 Federal 621.

These considerations dispose of this branch of the case. If it could be regarded as one involving the right to require one railroad to interchange traffic with another, the position of the complainant would be equally untenable. At common law a railroad company is only bound to transport freight to its own terminus. The rule is thus stated in A. T. and S. F. R. R. *v.* Denver N. O. R. R. Co., 110 U. S., 41:

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, deter-

mine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract, and if he holds himself out as a carrier beyond his line, so that he may be required to carry for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the half of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associate for doing his own work."

It is averred in the bill that the Southern Railway Company has notified the respondent that it would be and now is willing to be responsible from points of physical connection with the Louisville and Nashville railroad for the delivery of suck live stock and the collection of all charges on the same and would promptly return to such points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right in the absence of statute, to dictate to carriers the contracts they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other and other matters are to be determined by the contract between the parties. Each controls its own railroad and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern railroad for the trans-
102 portation and delivery of cars of live stock to the Central stock yards, if that can be assumed to be a station on the line of the Southern railroad, nor do we think a court of equity has the power to make one and supervise its execution, nor has this right been conferred upon the courts by the interstate-commerce act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it: A. T. & S. Railroad *v.* D. N. O. Railroad, 110 U. S. 667; Express cases, 117 U. S., 1; Pullman Palace Car Co. *v.* Missouri Pac. R'y Co., 115 U. S., 587; N. Pac. Railroad *v.* Dustin, 142 U. S., 492; Kentucky and I. Bridge Co. *v.* Louisville and N. R. R., 37 Fed., 567; L. and N. R. R. Co. *v.* St. L. M. R. R., 41 Fed., 559; Oregon Short Line Co. *v.* N. P. R. R., 51 Fed., 475; St. L. Drayage Co. *v.* L. and N. R. R., 65 Fed., 38; Allen and Lewis *v.* Oregon R. and Nav. Co., 98 Fed., 16.

It is further alleged that the duty of complying with the complainant's demand rests upon the defendant company, because of the requirements of the constitution of the State of Kentucky and the laws passed in pursuance thereof. Assuming, without deciding, that the Kentucky constitution and legislation require the defendant company to receive, deliver, transport and transfer freight to any point that is in physical connection with the tracks of another company, so that the complainant has, as to traffic originating in Kentucky, the right to require that the shipment be received and transported in accordance with the prayer of the bill, the question

remains, Have the Kentucky constitution and statutes any operations beyond the limits of that State? The interstate-commerce clause of the Federal Constitution has given rise to much litigation and frequent construction by the Supreme Court. It is thoroughly settled that the power of Congress to regulate commerce is plenary, and no State has the right to regulate purely interstate commerce. On the other hand, the State has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions we may refer to The County of Missouri *v.* Kimball, 102 U. S., 691. Mr. Justice Field, with his usual clearness, has called attention to the sound rules of construction to determine what is and what is not within the power of a State:

"Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined,
103 and its local aids or instruments or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adapt such a system. Action upon it by separate States is not, therefore, permissible." (Page 702.)

It is within the power of a State to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such lines of railroad. This may have been necessary for the accommodation of State commerce. Wisconsin R. R. *v.* Jameson, 179 U. S., 287. So it is competent for a State to require a railroad company to stop a certain number of trains each day at stations having a certain number of inhabitants, within the State. Such regulations do not interfere with the delivery or transportation of passengers traveling between States in such wise as to be regulations affecting interstate traffic. The statute simply amounted to requiring three trains of the company to stop at the stations named each day. Lake Shore *v.* Ohio, 173 U. S., 123. Likewise a State may require a telegraph company to deliver a message. Western Union *v.* McJames, 162 U. S., 650.

But it is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the States.

In the case at bar, we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction it would follow it could regulate interstate commerce. This it cannot do.

We reach the conclusion that no case was made in the bill justifying the relief prayed for, and that there was no error committed in dismissing the bill.

Judgment affirmed.

104 And afterwards to wit on August 25th 1902 a petition for rehearing was filed which reads and is as follows:

Petition for Rehearing.

105 United States Circuit Court of Appeals, Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Plaintiff in Error,
versus
LOUISVILLE & NASHVILLE RAILROAD Co., Defendant in Error. } No. 1070.

Appeal from the circuit court of the United States for the western district of Kentucky.

Petition for Rehearing.

J. C. Dodd, W. M. Smith, counsel.

Filed Aug. 25 1902

FRANK O. LOVELAND, *Clerk.*

106 United States Circuit Court of Appeals, Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Plaintiff in Error,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defenant in Error. } No. 1070. Petition for Rehearing.

Appeal from the circuit court of the United States for the western district of Kentucky.

Having carefully examined the opinion of the honorable court, we think that with propriety we may ask the court to consider whether this case be not one in which it would be proper to grant a rehearing to the plaintiff in error on the grounds hereinafter stated.

Said opinion, as understood, is based largely upon the cases of

Stock Yards Co. *v.* Keith, 139 U. S. 228–'36.

Butchers' & Drovers' Stock Yards Co. *v.* Louisville & Nashville Railroad Company, 67 Fed. Rep. 35.

Penn. R. R. Co. *v.* Commercial Bank of Chicago, 123 U. S. 727.

While the doctrine enunciated in these decisions is not questioned, it is respectfully submitted that under the facts in the case at bar said doctrine is not applicable.

It is earnestly insisted that these cases go no further than to determine that owing to the nature of these live-stock ship-
107 ments, facilities, other than those for dead freight, must be provided by the common carrier where such live freight is

required *to be loaded or unloaded on its lines.* Such facilities may be furnished by others than the common carrier, and if adequate they will meet the requirements of the law; and such carrier cannot be required, in any city, to furnish more than one depot where stock is to be loaded or unloaded; and it may, as a matter of right, deliver all such live freight coming over its lines at such depot, *provided the destination of said shipment terminates on the lines of said common carrier at said city.*

Upon a critical examination of these cases it is not thought that the law upon this proposition therein established is any broader than herein stated, that is, that the necessity for such live-stock depot, and the right on the part of the carrier to make delivery of shipments thereat, is dependent *solely* upon the question whether or not said common carrier is required *to load* or *unload said live stock on its own lines, at said city.*

The reason for the doctrine established by these cases is apparent; where a shipment of live stock is made, destined for delivery on the lines of a common carrier, the consignor has a right in law to demand that facilities be furnished by said common carrier at one point at said destination on its lines for the safe *unloading* of said stock, while on the other hand, as the handling of such live freight is more hazardous than that of dead freight, and additional facilities and service are required of the common carrier to *load* and *unload* same, said common carrier has a right to establish its live-stock depot and to require that all shipments of live stock over its lines, *where delivery is to be made by it by loading or unloading same on its lines,* shall be done at said depot so established. But if it be conceded that the live stock is neither to be *loaded* or *unloaded on the lines of the initial common carrier*, but is to be delivered *in bulk*, without change of cars, to a connecting carrier for delivery on its line *then both the questions of a live-stock depot on the initial carrier's line and the right of such carrier to deliver thereat* are eliminated
108 from the case, and the three decisions referred to have no bearing whatever upon the question at issue.

It is thoroughly understood that carriers of live stock are required to furnish facilities for unloading such stock for the purpose of feeding and watering as required by law, but that question does not arise and is not involved in any way whatever in the case at bar, and is therefore not considered in the statement of the propositions of law.

It is respectfully submitted that the case of Penn. R. R. Co. *v.* Commercial Bank of Chicago, 123 U. S. 727, has but slight bearing upon the case at bar. It simply states a general proposition of law as to the care in handling live stock. The Butchers' & Drovers' case, 67 Federal Reporter, and the Keith case, 139 U. S., deal solely with the proposition of compelling a common carrier to furnish, permit, or maintain *more than one live-stock depot on its lines at a given point.* Said cases do not touch upon the propositions such as presented by the case at bar, that is, where the initial carrier is not required to unload, but where it is simply sought to be compelled to

receive for shipment over its lines and to deliver to a connecting carrier for delivery by said connecting carrier.

In the case at bar, plaintiff in error simply asks that the Louisville & Nashville Railroad Company be compelled to receive when tendered any live stock, and to bill, transport, switch, and deliver the same, as ordered by its consignor, to the Southern Railway Company at any point of physical connection between the tracks of said Louisville & Nashville Railroad Company and the tracks of the Southern Railway Company in Kentucky, at Louisville, Kentucky, for delivery by the Southern Railway Company to the Central stock yards, etc., and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock. In the bill it is alleged, and not denied by the answer, that the said two railway systems have heretofore received and delivered, and are now receiving and delivering, each one to the other and
109 from the other, freight (other than live stock consigned to the Central stock yards) in car lots and less for delivery to consignees on the track or tracks of the one or the other. By the affidavit of S. A. Stalcup (Record, pages 29 to 31) this allegation is sustained, and while the defendant *fails to deny same in its answer* in the affidavits of Mr. Hines (pages 16 and 65 of the record) he in substance admits this allegation, but says that said shipments were only made as to live stock going to and coming from *non-competitive points*, but as to dead freight he makes no exception whatever.

At common law a common carrier was only required to carry freight tendered it to the end of its lines, but independent of the interstate-commerce act, common carriers were bound to serve any and all alike, and to carry any and all freight tendered to them within the line of their duties, and upon payment of their usual and customary charges, to deliver such goods to a connecting carrier where the consignment was destined to a point beyond the lines of the initial carrier. And further, at common law, it was and is the duty of a common carrier not only to deliver the goods to a connecting common carrier when destined to a point on the line of such connecting carrier, but its duty at common law was not fully performed until the initial carrier transmitted with the delivery to the connecting carrier *whatever instructions that may have been given to it as to the ultimate destination of the said consignment.*

When the consignment is delivered to a connecting carrier with instructions as to its ultimate destination, the liability of the initial carrier is ended, and it is a matter solely between the connecting carrier and the consignor for further carriage of the goods by such connecting carrier, and the compensation to be paid to such connecting carrier.

This common-law duty of a common carrier is well expressed by Mr. Elliott in his work on "Railroads," vol. 4, sections 1432 and 1440, as follows:

110 "SEC. 1432. As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the common-law duty of an

independent carrier is performed by safely transporting the goods over its own line and deliv-ing them to the consignee or connecting carrier, as the case may be. If in such a case the goods are to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent rather than a carrier as to such further transportation, and is not liable for the default of subsequent carriers. Its whole duty is not always performed, however, by merely tendering the goods to the connecting carrier. If the latter refuses to receive them, it is generally the duty of the initial carrier to notify the consignor or the consignee without unreasonable delay, and to store or otherwise take care of the goods for a reasonable time while awaiting instructions. So, where instructions are given it with the goods to be transmitted to succeeding carriers, it is the duty of such initial carrier to duly transmit them to the connecting carrier."

Citing numerous authorities.

"SEC. 1440. It is, in general, the duty of the initial carrier to obey the instructions of the shipper as to the route, mode of carriage and the like, and it should also transmit the instructions of the shipper to the connecting carrier."

Citing North *v.* Merchants' Trans. Co., 146 Mass. 315;
Palmer *v.* Chicago, &c., R. Co., 56 Conn. 137; 13 At. R. 818;
Little Miama R. R. Co. *v.* Washburn, 22 Ohio St. 324.

The leading case in the United States Supreme Court reports, at least that case seemingly considered by the text-writers to be the leading case, is that of Railroad Company *v.* Manufacturing Company, 16 Wall. 318. That case establishes the rule that a common carrier is only liable to the extent of his own route, and for his safe storage and delivery to the next carrier. The court, at pages 324 and 325, among other things, says:

"Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility of storing the goods at the end of his route without delivery or at attempt to deliver to the connecting carrier."

111 Further, at page 326:

"It is true the company were obliged to carry for all persons, without favor, in the regular course of business."

Further, at pages 328 and 329:

"The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal."

The case of Myrick *v.* Michigan Central R. R. Co., 107 U. S. 106, is an instructive case on the common-law duties of common carriers, and in the course of the court's opinion by Justice Field among other things it is said:

"A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for

transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond."

See also Penn. R. R. Co. *v.* Jones, 155 U. S. 333;
Daner *v.* N. Y. Central, &c., R. R. Co., 50 Howard Pr. 428;
Little Miama R. R. Co. *v.* Washburn, 22 Ohio St. 330;
Parker *v.* V. S. C. B. & Q. R. R. Co. and Penn. Co., 56 Conn. 137;
Bosworth *v.* Chicago R'y Co., 37 Federal, 72;
R. R. Co. *v.* Manufacturing Co., 16 Wallace, 318;
R. R. Co. *v.* Jones, 155 U. S., 333;
Vincent *v.* C. & A. R. R. Co., 49 Ill. 41–44;
Coe *v.* L. & N. R. R. Co., 3d Federal, 778.

Where live stock and perishable freight which will suffer damage by delays and by reason of handling, are to be transported
112 over more than one road, the initial carrier, *by reason of the long practice and recognized course of business in handling such freight and the absolute necessity therefor*, must deliver same without breaking bulk to the connecting carrier, that is, without unloading, and it must permit its cars to be used to the destination of said shipment. This practice and course of business is so absolutely necessary and well established that the courts take judicial notice thereof.

This proposition seems to have been conceded by this honorable court in the opinion rendered herein, and attention is now called to same merely for the purpose of showing that in the case at bar, the Louisville & Nashville railroad, in delivering to the Southern road as requested, not only would not be required to load or unload said live stock, but in law would not be permitted to do so, but would necessarily turn over the cars in which said live stock was loaded to the Southern railway, to be delivered by said road to the Central stock yards, and that therefore the facts in the case at bar places it outside of the rule in the Butchers' & Drovers' and Keith cases.

The authorities sustaining this proposition are as follows:

Peori & P. U. R'y Co. *v.* Railroad, 109 Ill. 135;
Louisville & Nashville R. R. Co. *v.* Williams, 95 Ky. 199;
Jacobson *v.* Wisconsin, Minnesota & Pacific R. R. Co., 71 Minn. 532; 40 L. R. A. 392; 179 U. S. 287; 70 Amer. State Reports, 364;
Burlington C. R. & N. R. R. Co. *v.* Deg, 82 Iowa, 312; 12 L. R. A. 436;
Michigan C. R. Co. *v.* Smithson, 45 Mich. 212;
Inmann *v.* St. Louis S. W. R. R. Co., 37 S. W. Report. 37.

In the opinion rendered herein it is held, that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company, and is a Louisville stock yard to be used in building

up the live-stock business to and from Louisville, and it is
113 said by the court, that these facts narrow the case to the consideration of the rights of complainant to require the Louisville & Nashville Railroad Company to make transfers to the Central Stock Yards Company over the connection of the Southern railway of live stock whose destination is Louisville.

At common law, while a common carrier cannot be compelled to carry beyond its lines or to make traffic arrangements with other roads for through billing, thus extending its lines by assuming responsibility for safe delivery, yet at common law such carrier is in the exercise of a public duty or office, and as such is bound to carry safely whatever goods are entrusted to it for transportation within the course of its business to the end of its route, and if the destination of said shipment is off of or beyond the termination of its own line, there is superadded to its duty that of a forwarder by the connecting line, and when instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of said initial carrier to duly transmit these instructions, and its responsibility is not discharged as a common carrier until it has so delivered said goods, *together with the instructions*. And as it is shown that the Louisville & Nashville Railroad Company is a common carrier engaged in the transportation of live stock, and that it has a physical connection between its tracks and that of the Southern railway in Kentucky, at Louisville, Kentucky, and as by reason of the long practice and course of business rendered absolutely necessary in the shipment of live stock delivery thereof in bulk is required, that is, without unloading, said road in assuming the duties of a common carrier of live stock, undertakes and agrees with the public, *and is required by law* to accept such shipments, to be handled *according to the usual custom and necessity of the case*, and where the destination is on the lines of a connecting carrier, to deliver it to said connecting carrier in bulk, that is, in its cars, as that is the usual and in fact the only way live stock is or can be handled.

If understood correctly, this honorable court holds that said
Central stock yards is a Louisville market, and *that the desti-*
114 *nation of the shipments made to it is the city of Louisville, Kentucky*, and as the Louisville & Nashville Railroad Company cannot be compelled to have more than one depot of delivery in said city, it has the right to deliver said shipments made to the Central stock yards at its depot of delivery, which is the Bourbon stock yards, in said city.

It is respectfully submitted that this conclusion is incorrect, because the right of delivery of live stock by a common carrier at its depot established for that purpose, is dependent *solely* upon the fact as to whether or not said initial carrier is required to *load* or *unload* said stock; and as said requirement and necessity for said depot only exists under that state of case, and as in the shipments to the Central stock yards the Louisville & Nashville Railroad Company is not only *not required to unload*, but under law cannot refuse to permit same to be shipped to the Central stock yards in bulk, in its

cars, delivery at its said live-stock depot is not only unnecessary but is in violation of plaintiff's rights.

For the purpose of argument, let us suppose that these shipments to the Central stock yards consisted of dead freight. Will it be contended that the Louisville & Nashville Railroad Company would not, under law, be compelled to receive said shipments and on their bill of lading show the destination, *Central stock yards?* The live-stock shipments only differ from the dead-freight shipments as to the responsibility and trouble of loading and unloading, and if it be conceded, as the authorities seem to hold without conflict, that these live-stock shipments are to be made without breaking bulk, that is, without change of cars, then this does away with said distinction between *dead* and *live* freight, because by reason of the nature of the live-stock shipments the right *to unload*, on the part of the initial carrier, is denied.

It certainly cannot be contended that it is any part of the duty of a common carrier to furnish to shippers of live stock any market therefor. The Louisville & Nashville Railroad Company has
115 undertaken to provide for itself in Louisville, Kentucky, not only a live-stock depot or loading and unloading chutes and pens, but a live-stock market for its patrons, and insists that shippers shall only patronize the market so provided by it. Can this be lawful and enforceable as against the wishes of the owners of live stock? We think not.

It is submitted that a common carrier cannot take into consideration in entering into its contract of carriage, *for what purpose the shipment is made*, as, by reason of its privileges granted, it becomes a quasi-public institution and must serve all alike who tender it shipments, affording all equal facilities for receiving, forwarding and delivering said shipments to and from its several lines and those connecting therewith, giving no unreasonable preference or advantage to any person, or corporation, or locality. This is no new doctrine, but is a fundamental principle of the common law, clearly and forcibly stated by Judge Baxter in the case of McCoy *v.* C., I. & St. L. R. Co., 13 Federal Reporter, page 3. In that case it is said:

"The facts suggest a very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities for the benefit of other persons or communities. As common carriers, they are by law bound to receive, transport, and deliver freights offered for that purpose, in accordance with the usual course of business. The delivery, when practical, must be to the consignee."

The third section of the interstate-commerce act is equally as broad upon this proposition as the common-law doctrine just stated.

Admitting that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company and established as a general stock depot for receiving and delivery of stock at Louisville, Kentucky, as is held by this honorable court, in view of

the plain letter of the law it is difficult to see how this state
116 of affairs can have any controlling or even persuasive influence in determining the legal propositions submitted.

It seems to be settled beyond controversy, that a common carrier must serve the public equally. It is certainly as well settled that where it holds itself out as a common carrier of live stock, it must accept such shipments tendered and make carriage thereof in the usual and customary way, that is, without breaking bulk, and in accepting such shipments, where the destination is not upon the lines of the initial carrier, but in order to reach the consignee it must be delivered by the initial carrier to a connecting carrier for delivery, the duty of the initial carrier is not discharged until he has made such delivery together with the instructions as to the destination, for if it were otherwise then certainly the general business of the country would greatly suffer, as in most shipments the consignor is unable to follow in person said shipment.

It is thought to be well settled that the right of the initial carrier to deliver at its established stock depot is dependent solely upon the question as to whether or not, under the contract of shipment, *a loading* or *unloading* of said stock is made necessary on the lines of said initial carrier at said point. It is certainly the only condition upon which *this right of delivery at said depot arises*, that is, the responsibility and trouble of loading and unloading. How then can the fact that this live stock is delivered for the *Louisville market* make any change in the principle of the law under the state of facts existing in this case, which requires that the initial carrier shall deliver to the connecting carrier for delivery? There seems but one answer to this question, viewing it from the standpoint of defendant as its defense is presented both by its answer and affidavits, that is, that it will not deliver to the Central stock yards because in doing so it is thereby strengthening and building up an adversary of its own live-stock depot.

If the delivery of the shipment is to be made by a connecting
117 carrier on a market other than that of Louisville, it is not thought that it would be contended that the Louisville & Nashville railroad *could not* be compelled to receive and make said delivery to the connecting carrier. What principle then of right or equity is there that changes the rule because the delivery is to be made to a connecting line for delivery to the consignee for the same market whereon the common carrier has employed *a like enterprise?*

It is evident that this honorable court concluded that as the Central stock yards was a *Louisville market*, that the destination of shipments thereto was reached upon the arrival of the Louisville & Nashville trains at Louisville, and that, therefore, a delivery was to be made by the Louisville & Nashville, thus giving it the right to unload at its stock yards and make such delivery therefrom. In view of the requirements of both the common law and the interstate-commerce act it is respectfully submitted that this conclusion is erroneous, because the physical connection not only exists between the tracks of the two roads, but is in constant use for all shipments

except those of live stock destined to the Central stock yards, and the only reason for this exception is shown both by the answer of defendant and affidavits filed therewith; that is, that it and the Bourbon stock yards have expended considerable money in erecting and equipping said yards, and that it is entitled to deliver all stock hauled over its road at said yards, and to require it to deliver to the Southern would also put it to considerable inconvenience and require an additional engine and crew.

Stated briefly, the substance of defendant's defense herein is that to require it to deliver to the Southern would work an injury to its stock yards and prevent it from compelling shippers to patronize same regardless of their wishes in the matter, and would also compel it to furnish the public such service as is due from it by reason of the privileges granted.

If this is the law, then it necessarily results that whenever any railroad entering a given city establishes its stock yards, if it happens that its lines pass through the stock-growing section
118 of the country, as in the case of the Louisville & Nashville railroad, then said road can make a monopoly of the stock-yards business, although it may have a physical connection between its tracks and those of other roads in said city, upon which other roads there are also established stock yards; because, as shown in this case, and as is also a fact so well known that the court may take judicial notice of it, that to require the stock to be delivered at the Bourbon stock yards and there unloaded, and then reloaded and shipped to the Central stock yards, or driven on foot through the populous part of the city, a distance of some six miles, would cause such a loss to said stock in shrinkage and waste, damage and expense, as to make it entirely unprofitable to the shippers. This certainly ought not to be the law regarding the question, simply from a point of common honesty and fair dealing. The wishes of a shipper, where the facilities exist for carriage, certainly ought to be consulted. He may have many good and valid reasons for desiring to patronize one yard instead of another, and the common carrier is granted its existence and privileges upon the idea that it will, according to its powers, furnish equal facilities for the receiving and forwarding and delivery of the property of said shippers to and from its several lines and those connecting therewith, and it has no right whatever to inquire before receiving said shipments as to the uses to be made thereof when the same reaches its destination. To grant it such power would place it above the interests of the people, that it is created for and required to serve, and it certainly will not be contended that such reasonable and just requirements as are herein asked, although it may put said road to some inconvenience and require it to furnish additional rolling stock and service to handle the increase of business, will constitute any legal excuse.

In the opinion rendered by this honorable court herein it is said:

"It is averred in the bill that the Southern Railway Com-
119 pany has notified the respondent that it would be and now is willing to be responsible from points of physical connection

with the Louisville & Nashville railroad for the delivery of such live stock and the collection of all charges on the same, and would promptly return to all points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right, in the absence of statute, to dictate to carriers the contract they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters are to be determined by the contract between the parties. Each controls it- own railroad and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern railroad for the transportation and delivery of cars of live stock to the Central stock yards, if that can be assumed to be a station on the line of the Southern railroad, nor do we think a court of equity has the power to make one and supervise its execution, nor has this right been conferred upon the courts by the interstate-commerce act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it:

A. T. & S. R. R. *v.* D. N. O. R. R., 110 U. S. 667;
Express cases, 117 U. S. 1;
Pullman Palace Car Co. *v.* Missouri Pac. R'y Co., 115 U. S. 587;
N. Pac. R. R. *v.* Dustin, 142 U. S. 492;
Kentucky & I. Bridge Co. *v.* Louisville & N. R. R., 37 Fed. 567;
L. & N. R. R. Co. *v.* St. L. M. R. R., 41 Fed. 599;
Oregon Short Line Co. *v.* N. P. R. R., 51 Fed. 475;
St. L. Drayage Co. *v.* L. & N. R. R., 65 Fed. 38;
Allen & Lewis *v.* Oregon R. and Nav. Co., 98 Fed. 16."

It is respectfully submitted that in this conclusion the court is incorrect, because, while it is alleged in said bill that the Southern Railway Company had notified the Louisville & Nashville Railroad Company that it would receive at such points of physical
120 connection and be responsible for return of freight and immediate return of empties, it does not necessarily follow that from the making of this offer by the Southern railway that in order to grant the relief sought herein by plaintiff that the court should determine that said Louisville & Nashville Railroad Company should accept such proposition, although the evidence in the case, as shown, clearly establishes that such arrangements had been entered into between said roads relating to all other shipments except such as were destined to the Central stock yards.

In the record of this case (between pages 74 and 75) is attached a Louisville & Nashville Railroad Company contract for the transportation of live stock over its lines, same being such a contract as the court herein is asked to compel the Louisville & Nashville rail-

road to enter into as to shipments of live stock tendered it destined to the Central stock yards, and by the very terms of said contract, section 1, it is provided that the shipper releases the common carrier from all liability, etc., if the shipment is destined to a point beyond said carrier's lines when the delivery is made to the connecting carrier.

It thus clearly appears that no interchange of joint traffic between these two roads is asked of the court, or any through billing, nor is it sought to compel the Louisville & Nashville Railroad Company to carry except on its own lines. This court is simply asked to compel the Louisville & Nashville Railroad Company, as it is its duty to do, to receive shipments from owners and consignors of live stock, and to show upon said bill of lading, as in its live-stock contract filed, the destination of said shipment, and to deliver same to the connecting carrier as both at common law and statute it was and is its duty to do, and if such requirements are made by the court the initial carrier's responsibility would cease upon the delivery to the connecting carrier.

The authorities cited by this honorable court may sustain the said statement made in the opinion, but it is respectfully sub-
121 mitted that in the case at issue this state of facts do not exist, as this bill does not seek to compel the defendants to enter into any joint traffic arrangement, or through billing. By the terms of the live-stock contract of the Louisville & Nashville railroad filed, which is the usual and customary contract entered into by all roads, it is shown that the initial carrier's responsibility ceases whenever it delivers to the connecting carrier, and the law requires *him* to also deliver to such connecting carrier on the delivery of such freight the instructions of the shipper as to destination, and the contract filed shows a blank left to indicate the destination.

The bill in this case, briefly stated, simply asks that the defendant be compelled to receive, ship, transport, transfer, switch, and deliver to the connecting carrier, and while it is stated in the body of said bill that the Southern Railway Company had agreed to be responsible for the collection of freights, etc., it is not asked that the mandatory injunction prayed for, require defendant to ship under said arrangement with the Southern as to the said freight, but simply that it be required to receive and deliver, which necessarily means in the usual way and under the usual terms and conditions, but even had the bill asked that defendant be required to enter into this arrangement with the Southern as to freight, still, although it might not be entitled to this requirement, if it shows upon its face that the defendant is violating a plain, legal duty, regardless of this allegation as to freights, the plaintiff is entitled to redress to the extent that it is necessary to be given to remedy the wrong and injury suffered. This allegation as to freight certainly cannot deprive plaintiff of its legal rights, if they are shown to exist, although said freight arrangement may not be one of the elements of said right. It will not be deprived of what it is entitled to because it asks more.

The case presented as to the proposition of defendant's rights as to freights shows the following state of facts and laws:

By the affidavit of T. C. Powell (Record, pages 32 to 36), the physical connection between these two roads is shown to exist,
122 and that the movement required for delivery of cars from one road to the other is simply a *switching movement*, and made within the switching limits of the city of Louisville, for which a fixed price, $2.00, is established, and cannot be changed or varied by the initial carrier, and that therefore this charge cannot and does not enter or become a part of the freight charge for the haul by the Louisville & Nashville railroad from the point where said freight is received to the city of Louisville, and that therefore it is not and cannot be a subject of through billing or traffic contract entered into by the two roads.

The court's attention is respectfully called to the case of Chicago N. & St. P. R'y Co. *v.* Becker and others, 32 Federal Reporter, page 849, as fully sustaining this last contention as to the switching movement.

Also to The State of Iowa *v.* Chicago N. & St. P. R'y Co., 33 Federal Reporter, page 391.

It is thought that these cases are conclusive of this question.

As stated, the court is asked to require the defendant to receive and deliver to the connecting carrier. If the court grants such relief, it would certainly do so requiring defendant to receive and deliver under the usual custom, terms, and conditions, and in conformity to the law governing the question of freights, and nothing more is asked or intended to be asked by said bill. If this be a correct statement of the law, as it is thought to be, then the question of the collection of freights from the point of reception to the point of delivery by the initial carrier is a matter dependent upon the wishes and demands of the said initial carrier, as in law he has the right to demand prepayment of such freights before any transportation of or delivery to the connecting carrier.

In the 2d edition of the American and English Encyclopedia of Law, vol. 5, page 166, it is said:

"Upon a demand therefor by the carrier, a shipper is bound to prepay all freight charges on goods tendered for transportation."

and a number of authorities are cited thereunder.

123 In Galena & Chicago U. R. R. Company *v.* Rae, 68th American Decisions, page 574 (quoting from the syllabus) it is said:

"A railroad company may demand prepayment of freight charges, but in omitting such demand the company becomes bound to transport the freight according to its custom, and slight evidence of willingness to pay will be sufficient to support an action for damages caused by refusal to receive such freight."

Again, it is said in the American & English Encyclopedia of Law, 1st edition, vol. 25, page 904:

"The actual production of money is not required where the party is ready and willing to pay but is prevented by the creditor declar-

ing that he will not receive it, or by his making any declaration equivalent to a refusal to accept it if tendered."

See cases cited in note thereunder as follows:

Dorsey *v.* Cock, 4 Bibb, 45;
Tibbs *v.* Timberlake, 4 Littell, 16;
Dorsey *v.* Barbee, Littell's Select Cases, 205;
Stapp *v.* Phelps, 7th Dana, 301;
Sanford *v.* Farmers' Bank, 1st Bush, 340;
Mundy *v.* Kaan's Adm'r, 5th Ky. Law Reporter, 697;
Jones *v.* Strode, 19th Ky. Law Reporter, 118.

Neither the bill in this case nor the answer shows that any prepayment of freight was demanded by the defendant of the shippers, but, on the contrary, said bill shows that defendant not only refused to receive such shipments destined to the Central stock yards, or to indicate said destination upon its contract of shipment, but that it issued its circular letter to all of its agents along its routes directing them not to receive such shipments, thereby making a tender of freight charges unnecessary, and it is further shown that even where such shipments were received, that when same arrived at the city of Louisville, instead of being delivered to the connecting carrier,
124 they were unloaded at said Bourbon stock yards, against the known request and wishes of the shippers.

In the argument made herein before this honorable court it was contended for defendant that there were no facilities at the place of physical connection between the two roads where the stock could be inspected or the freight collected; but this argument was entirely outside of the record in this case, as neither in the answer or affidavits filed is this defense presented as to the existing condition at said place of physical connection, nor are the facilities existing for inspection and collection of freights shown in any way whatever; but the record does show that at said place live stock destined for non-competitive points, and all other freight, is daily exchanged between the two said roads.

The answer in this case does not present any defense based on the idea of freights, but rests the entire case upon the two questions:

1. That having at great expense established its own stock yards it has a right in law to deliver all freights coming over its lines at said stock yards.

2. That to require it to deliver to the Southern would disarrange its manner of transacting business and put it to considerable trouble and expense in having to furnish an additional engine and crew.

This certainly presents a fair statement of the defenses tendered, and it is submitted that it is shown by the bill that what may be termed the *technical* objections to the enforcement of the right to have this stock received and delivered have been fully met, bringing the case down upon its merits to the two propositions of defense stated.

If it be true that plaintiff is entitled, as a matter of law, to have these shipments delivered to the connecting carrier, then the violation of that right is so far-reaching and so detrimental to the

interests of the Central stock yards, with its investment of some two hundred thousand dollars, and of such great importance to
125 the public generally, that no court ought to permit technical questions to stand in the way of the enforcement of said right, unless compelled to do so by some imperative requirement of the law.

As to the second defense relied on by defendant, that is, that to require it to deliver to the Southern railway would disarrange its manner of transacting business and put it to trouble and expense in having to furnish an additional engine and crew, it is not thought that it will be seriously insisted that this defense is valid or constitutes any legal excuse whatever for the non-performance of a plain duty. The defendant is engaged in a public service and has placed its property in such a position that the public has an interest in its use It has assumed said relation and agreed voluntarily to accept all the conditions of said service which attach. It does not perform said service with a single idea of profit, and it must comply with all requirements, although they may result in inconvenience, expense, etc.

Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287.
Worcester *v.* Norwich & W. R. Co., 109 Mass. 112.
People *ex rel.* Green *v.* Duchess & C. R. Co., 58 N. Y. 152.
People *ex rel.* Kimble *v.* Boston & A. R. Co., 70 N. Y. 569.
People *ex rel. v.* N. Y., L. E. & A. R. Co., 104 N. Y. 58.
58th American Reports, 484.
9th N. E. 856.
Cotting *v.* Goddard, Supreme Court Advance Sheets, Dec. 16, 1901, page 32.

Interstate-commerce Act.

The propositions herein have been considered at some length under the common law, as this honorable court seems to have based its opinion largely on such principles, regardless of the interstate-commerce act, or, in other words, upon incidental questions before the merits of the case are reached; those questions being:

1. That having established a stock depot on its own lines at Louisville, Kentucky, and as the Central stock yards is a
126 *Louisville market*, the shipments thereto over the lines of the Louisville & Nashville Railroad Company, can, under law, be delivered by said company at its said stock yards, regardless of the directions or wishes of the shipper.

2. That to grant the relief asked would be to require the said Louisville & Nashville railroad to enter into joint traffic arrangements or through billing with the Southern railway.

It is thought that both these conclusions are incorrect, by reason of the state of facts existing and the law herein cited.

Considering the case under the interstate-commerce act there seems to be but two questions pertinent.

1. Whether or not, conceding that the Central stock yards is a Louisville market, the Louisville & Nashville railroad can, under

the interstate-commerce act, interpreted in the light of the common law governing carriers, be required to receive and show upon its said contracts of shipment the destination of interstate shipments of live stock to said Central stock yards, and transport same over its lines.

2. Whether or not, under the interstate-commerce act, or the 213th section of the constitution of Kentucky, or both, the Louisville & Nashville Railroad Company can be required to deliver to the Southern Railway Company, at Louisville, Kentucky, for delivery at the Central stock yards, such interstate shipments coming over its lines.

Section 3 of the act to regulate commerce, vol. 1, second edition, U. S. Supplement, page 529, reads as follows:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for
127 the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 213 of the constitution of Kentucky reads as follows:

"SEC. 213. *Freight and cars to be handled and transported without discrimination.*—All railroad, transfer, belt lines, and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines, or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car-loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

As to the first question presented, that is, whether or not under the interstate-commerce act supplementing the duties of carriers under the common law, the defendant can be required to receive

and transport, together with the instructions of the shipper, these interstate shipments.

Under the common law a carrier is required to receive and transport for all alike, and where the delivery of shipments is to be made beyond its lines, to receive and forward the instructions of the shipper and to deliver same, together with the shipment, to the connecting line. This is thought to have been conclusively shown to be the law.

128 The third section of the interstate-commerce act certainly does not restrict these duties and liabilities of the carrier under the common law. By said act it is made unlawful for said carrier to give any undue or unreasonable preference or advantage to any particular person or locality or description of traffic in any respect whatever, or to subject any person or locality or description of traffic to any unreasonable prejudice or disadvantage, and it requires said carrier, according to its respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between its lines, and for the receiving, forwarding, and delivery of passengers and property to and from its several lines and those connecting therewith.

The mere statement of these propositions seems to render unnecessary any argument as to their correctness. The principles of the common law as stated are well established. The third section of the interstate-commerce act certainly means something, and was and is intended to apply to some state of case, and it is difficult, if not impossible, to imagine a case where this section could apply if not in the case stated. Besides, the requirements asked are so reasonable and absolutely just, and the reason for the failure to comply therewith so plainly dictated by the selfish purpose on the part of defendant to foster and build up a stock market on its line exclusive of other like enterprises, as to merit condemnation on principles of equity, regardless of statutory aid.

The case presented is clearly within the letter of the third clause of the interstate-commerce act, and if that section does not apply then the said section is necessarily meaningless. With a case fairly presenting every condition condemned by the said third section, complainant and the public generally are entitled to an authoritative interpretation of said section.

Here we have a description of traffic—live stock—a class of persons, viz., live-stock raisers, dealers, and handlers, and a particular locality, Central stock yards, subjected to an unreasonable prejudice and disadvantage.

129 There can be no question of the existing facilities for the Louisville & Nashville Railroad Company to interchange traffic between its lines and the lines of the Southern railway when demanded by the public and have delivery of traffic made accordingly as ordered by shippers.

The question, therefore, is, can these plain and unambiguous provisions of the said act be disregarded by the defendant?

In considering the second proposition, assistance may be had in arriving at a correct determination by making a comparison of the

third section of the interstate-commerce act, and the said 213th section of the constitution of Kentucky.

It is submitted that section 3 of the interstate-commerce act makes certain requirements of the carrier in general terms, that is, to require it to furnish equal facilities, *without going into detail as to said facilities*, while section 213 of the constitution requires no more than is perhaps required by the interstate-commerce section (that is, as to any proposition involved in this case), but *does enter into detail*, setting forth specifically the acts required in order to furnish said facilities for the interchange of traffic, and forwarding and delivering same between the lines of defendant and those connecting therewith.

That it was intended by the 213th section of the constitution and legislation had thereon, to require a common carrier to receive, deliver, transport, and transfer freight to any point that is in physical connection with the tracks of the other company there seems to be no doubt, in view of the language used in said section. That the highest court of the State of Kentucky so considered is evident from the language used in the case of The Louisville & Nashville Railroad Company *v.* Williams, 95 Ky. 199 (court of appeals). Therein it is said:

"It seems to us the constitutional provisions by which one railroad company is compelled (thereby admitting the contention of the L. & N. therein) to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe
130 to those who are required to handle them, it is the duty of the company to refuse to receive the car if such defect exists, and no other construction, it seems to us, can well be given this clause of the constitution.

In the opinion rendered by this honorable court it is said:

"It is thoroughly settled that the power of Congress to regulate commerce is plenary, and no State has the right to regulate purely interstate commerce. On the other hand, the State has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to The County of Mobile *v.* Kimball, 102 U. S. 691."

Then, after making the quotation from said case, the court holds that the relief sought herein pertains to the transportation and delivery of interstate freight. That it is not the means of making a physical connection with other railroads that is aimed at, but that it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way, and that if the constitution of Kentucky could be given such construction it would follow that it could regulate interstate commerce.

It is submitted that under the law as it now exists, where Congress has not acted the States may, and that even in cases where Congress has taken action as to the given proposition, that still the State may exercise its police power and legislate, provided such legis-

lation is not in conflict with the provisions of congressional enactments.

There are numerous authorities to the effect that the police power of a State cannot be effectually granted or contracted away, or in anywise relinquished, and following along said line of authorities, in Louisville & Nashville Railroad Company *v.* Commonwealth of Kentucky, 161 U. S., page 701 (859), it is said:

"But little need be said in answer to the final contention of the plaintiff in error that the assumption of a right to forbid the
131 consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, *and add something to the cost of transportation by the expense incurred in conforming to such regulations.* These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions which might perhaps lead to an inference that the police power cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to the commerce itself, it is not true with respect to the *instruments* of such commerce."

It was said in Sherlock *v.* Alling, 93 U. S. 99, 103, 104 (23–819–821), and quoted with approbation in Plumley *v.* Massachusetts, 155 U. S. 462 (39 : 224), that

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it (702) within the meaning of the Constitution * * * *and it may be said, generally, that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens,* and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon *citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.*"

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to *the instruments of such commerce,* so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power

over them as soon as they were finished. The power to con-
132 struct them involves necessarily the power to impose such regulations upon their operations as a sound regard for the *interests of the public may seem to render desirable.* In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith; *while to the State remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.*" (Our italics.)

The police power of a State, in its broadest acceptation, means the general power to preserve and promote public welfare, even at the expense of private rights, in order to protect the health, peace, comfort, morals, convenience, and prosperity of the people of the State. This is shown by the Lake Shore, &c., R. R. Co. *v.* Ohio, 173 U. S. 285, and a number of other authorities.

In considering this question, it is very necessary to bear in mind that the Louisville & Nashville Railroad Company is a Kentucky corporation, created by the legislature of Kentucky, and subject to control by same. The 213th section of the constitution of the State of Kentucky, as far as the questions involved in this case are concerned, is not in conflict with the provisions of the 3d section of the interstate-commerce act, but is plainly in aid thereof. Said section of the constitution is not directed against interstate-commerce shipments, but, as said in Wisconsin M. & P. R. Co. *v.* Jacobson, would plainly afford facilities to interstate commerce, and would in no wise regulate such commerce. Besides, it is evident from the bill and affidavits filed in this case that there was a necessity for such requirement of delivery as to intrastate commerce, and conceding that such necessity exists for intrastate commerce in order to subserve the convenience and prosperity of the citizens of this State, as said in Sherlock *v.* Alling, 93 U. S. 99, 103–104 (23, 819–821), and reported with approbation in the Jacobson case, legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution, and it may be said generally that the legis-
133 lation of a State not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of an obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.

It is conceded that where Congress has prescribed a regulation as to any given proposition respecting interstate commerce that said enactment is of a plenary nature, and that any State legislation in conflict therewith is void; but if such legislation be simply in aid of the congressional enactment, then it may be enforced, provided it is within the limits of the police power of said State; and it is thought to be the law that as to such police power the State cannot effectually grant it away; but, however this may be, it is reasonably certain that if said enactment is not in conflict with the congres-

sional enactment, and is within the limit of the police power, that it is enforceable.

In the case at bar, while this honorable court seems to concede these propositions as stated, it holds that the State requirement of a delivery to a connecting line is a regulation of interstate commerce, as it pertains to the transportation and delivery of interstate freight, and not to the means of making a physical connection with other railroads. While it is true that it does not pertain, as in the Jacobson case, to the means of making a physical connection with other roads, as a physical connection already exists, it is a regulation as to the means of delivery of all freight. The necessity therefor, as far as intrastate freight is concerned, is shown to exist, and it certainly has the right to regulate the delivery of such freight. If this incidentally or indirectly also regulates the delivery of interstate freight the destination of which is the city of Louisville, in the State of Kentucky, then it is not thought that this is such a regulation or requirement as to constitute an unreasonable interference with interstate commerce; and as said in Louisville & Nashville Railroad Co. *v.* The Commonwealth of Ken-
134 tucky, 161 U. S., page 699 (859): "Nearly all of the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operations as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith, while to the State remains the power *to create and to regulate the instruments of such commerce* so far as necessary to the conservation of the public interests." Thus it plainly appears that the power of the State, although Congress has acted, is not exhausted by simply requiring the track to be laid and the connections formed, but it may, in addition thereto, regulate the instruments of such commerce. It would certainly be a useless requirement to make these carriers furnish reasonable facilities for the interchange of traffic between their lines and those of other roads and still not have the power to so regulate such commerce as to require its interchange by the use of such facilities. The purpose of the connection is but half served in laying the tracks. The main object thereof is the interchange of traffic. It is submitted that the court is in error in determining that a requirement to make delivery to a connecting carrier is such a regulation, considering the case presented, as is not enforceable, because, first, the plain construction of the third section of the interstate-commerce act requires such delivery. The constitutional provision is simply in aid thereof, and is within the limits of the reserve police powers of the State. It is a reasonable regulation, and does not interfere in any way whatever, by reason of delay of or otherwise, with the delivery of such shipments. While it may result in the control of the manner of delivery of interstate shipments, it does so only indirectly by the exercise of an authority as to the regulation

of the instruments of delivery, and not by direct enactment intended to control interstate freight.

In the case of Richmond & Alleghany R. R. Co. *v.* R. A. Patterson Tobacco Co., 169 U. S. 309 (759), a contract of shipment
135 was issued for the shipment of interstate freight, its destination being beyond the lines of the initial carrier, and said contract of shipment by express terms released said initial carrier of all responsibility upon delivery to the connecting carrier. Said shipment was made from the State of Virginia to a point in the State of Louisiana. There was at the time a provision in the code of the State of Virginia providing that in the case of such shipments that the initial carrier should not be released from responsibility for loss, etc., except by contract in writing signed by the shipper. The case was submitted to the trial court on an agreed statement admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. Plaintiff rested on the statute above quoted, and the defendant on its claim that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States. In said case, which was carried from the supreme court of the State of Virginia to the United States Supreme Court, the Supreme Court of the United States held the carrier liable upon the idea that said State enactment, although it affected interstate commerce, was not a regulation thereof, but a rule of evidence made necessary by the State enactment in order to release such liability.

In Chicago, Milwaukee & St. Paul R'y Co. *v.* Patrick L. Solan, 169 U. S., page 133 (688), it is held that a State statute prohibiting contracts to exempt a railroad company from liability as a common carrier is not in any just sense a regulation of commerce, or void as to interstate business.

In Missouri, Kansas & Texas R'y Co. *v.* Charles Haber, 169 U. S., page 613 (878), it is held that State regulations of the enjoyment of rights, or the performance of duties that do not directly interfere with the Federal Constitution, or acts of Congress, must be respected until Congress intervenes, although the subject may be within its control.

The court in considering this case should not lose sight of the fact that defendant is a Kentucky corporation, and that it acquired
136 all of its rights under its charter subject to the power of the State of Kentucky through constitutional provisions or legislative enactments to regulate and control the grant in the interest of the public.

If the court will read the debates of the constitutional convention of Kentucky (1890), wherein section 213 was adopted, it will be seen that the convention, in the interest of the general public, recognized the fact that it was no proper business of a common carrier to foster particular enterprises, but that, deriving its franchises from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them

reasonable facilities for the transportation of their persons and property, and to put all of its patrons on an *absolute equality*.

We have always understood the law to be, and the highest court of the State, of defendant's creation, has held, that public policy forbids that common carriers shall be permitted to favor one shipper or consignee, or one class of shippers or consignees, in discharging the general duty to accept and carry goods without discrimination or prejudice between classes. See L. & N. R. R. Co. *v.* Pittsburgh & Kanawha Coal Co., 23 Ky. Law Rep. 1318.

The Supreme Court of the United States, in Louisville & Nashville Railroad Company *v.* Kentucky, 183 U. S. 503, in speaking of the rights of the defendant, Louisville & Nashville Railroad Company, under its charter as against the demands of the constitution of Kentucky, of which section 213 is a part, said, at pages 517 and 518:

"As it has been said of the one, so it may be said of the other, that the charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.

"In Pennsylvania Railroad *v.* Miller, 132 U. S. 75, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the State and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as applied to
137 the company in respect to cases afterwards arising, did not impair the obligation of any contract between it and the State, and that the company took its charter subject to the general law of the State and to such changes as might be made in such general law, and subject to future general legislation, since there was no prior contract with it exempting it from such enactments.

"The same principle was announced in Louisville Water Co. *v.* Clark, 143 U. S. 1, and in Louisville & Nashville Railroad *v.* Kentucky, 161 U. S. 677."

Again, at page 518:

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial powers of the General Government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. New York, Lake Erie & Western Railroad *v.* Pennsylvania, 158 U. S. 431, 439; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150.

"A discussion of this subject will be found in the opinion of this court in Louisville & Nashville Railroad *v.* Kentucky, 161 U. S. 677, 701, where the same conclusion was reached."

It is thought that the case of Minneapolis & St. L. R. Co. *v.* Minnesota *ex rel.* R. R. & W. Com., decided January 2, 1902, by the Supreme Court of the United States and found in No. 17 Advance

Sheet, August 1, 1902, which involves the same act of the legislature that was under condideration in the Jacobson case, 179 U. S., has considerable bearing upon the questions herein raised. This case was brought by writ of error from the supreme court of Minnesota (see 80 Minn. 191, 83 N. W. 60), and in the opinion of said State court it is shown that joint traffic arrangements existed between the several roads. The court held, however, in that case, that independent of such previously existing joint arrangements, no reason existed why under the amendatory act the commis-
138 sion could not lawfully compel a joint arrangement in a case like the one at bar. The court is respectfully referred to this State court opinion, as it seems to have been well considered.

The United States Supreme Court, however, on this point held that it was not necessary to determine that question in the case, as all that it was required to hold was that where joint traffic between two or more roads had been agreed upon, such traffic is as much within the control of the legislature as if it related only to transportation over a single road. The intimation in said opinion, however, is clear that if it had been necessary to determine said question it would have approved the holding of the State court.

In the course of said opinion Justice Brown says:

"The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the State to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable, and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument, in its various applications, is one which has been addressed to and considered by this court in nearly every case in which the power of the State to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the State to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation
139 is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being

practically compelled to submit to such terms as the former may choose to exact, unless the State shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges."

* * * "Granting that a State has no right to interfere with the internal economy of a railroad further than to secure the safety and comfort of passengers, as, for example, to fix the wages of employés or control its contracts for construction or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned." * * *

"We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress, in passing the interstate-commerce act, assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States (Cincinnati, N. O. & T. P. R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700), and that, if the power of the State commission were limited to the tariffs of a single road it would be wholly inefficacious in a large number if not in a majority of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis & St. Louis Company. It may also be said, in this connection, that in Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115, we
140 held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion they are in favor of such right. See also Burlington, C. R. & N. R. Co. *v.* Dey, 82 Iowa, 312, 338, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line."

In this case, in speaking of joint traffic arrangements, it is said that "so far as applies to contracts already in existence, we have no doubt of the power of the State to supervise and regulate them."

As shown in the case at bar, no interference is sought whatever to

be had with the freight charges from the point said goods are received to the city of Louisville, and the charge for the switching movement does not and cannot enter into said freight charge, but is a joint contract arrangement of switching and of switching charges within the switching limits of the city of Louisville, in the State of Kentucky, which cannot be changed by the carrier.

As it is thought this case also determines what was intended by said court to be held in the Jacobson case, that is, not only that connection at intersections of roads for transferring cars from the lines or tracks of one company to those of another may be compelled, but that facilities for the interchange of cars and traffic between the two lines can be enforced. This seems to us to be, on this as well
141 as other points, at variance with the construction given this opinion by this honorable court.

The opinion of this court herein, as understood by us, gives no effect or meaning to the third section of the interstate-commerce act, and denies to the State of Kentucky, by constitutional requirements or legislative enactment, the power to regulate and control, in the interest of the public, a grant given by it to a common carrier.

We submit that a rehearing should be granted, and so pray.

CENTRAL STOCK YARDS COMPANY,
By J. C. DODD,
W. M. SMITH, *Counsel.*

I certify that I am one of the counsel for the plaintiff in error herein, Central Stock Yards Company, and that I believe the grounds alleged are well founded, are such as warrant a rehearing of this case or a modification of the opinion, and that this petition is not interposed for delay.

W. M. SMITH.

142 And afterwards to wit on October 7th, 1902, an order denying said petition for rehearing was entered which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
L. & N. R. R. Co.

The petition to rehear in this case is denied.

And afterwards to wit on October 13th 1902, an entry was made upon the journal of said court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS CO.
v.
L. & N. R. R. Co.
Before Lurton, Day, & Severens, JJ.

Petition for appeal by the Central Stock Yards Co. is submitted.

And on the same day to wit on October 13th 1902 petition for appeal was filed clothed in the words and figures as follows:

143 United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Petition for appeal from the United States circuit court of appeals for the sixth circuit to the Supreme Court of the United States and assignment of errors.

Your petitioner, The Central Stock Yards Company, would respectfully pray an appeal from the judgment entered in this court herein on the 8th day of July, 1902, to the Supreme Court of the United States.

Your petitioner respectfully assigns the following errors in the said judgment of this court:

1. The court erred in holding that under the interstate-commerce act, and particularly the 3rd section thereof, the appellee could not be required to receive, bill, transport, transfer, switch, deliver and interchange interstate live-stock traffic, consigned to appellant, with the Southern Railway Company in Kentucky at points of physical connection between the two lines.

2. The court erred in holding that to require appellant to show the destination of interstate live-stock traffic consigned to appellant in its billing thereof, and to transport, transfer, switch, and deliver the same to appellant via the Southern Railway Company for delivery purposes would be the judicial making of a joint tariff between the Southern Railway Company and appellee, or any
144 division of through rates.

3. The court erred in holding that the provisions of the constitution of Kentucky, relied on, are in any respect, in conflict with the interstate-commerce act, or in any manner attempted to regulate interstate commerce.

4. The court erred in holding that the State of Kentucky could not, by constitutional requirement or legislative enactment, impose upon common carriers doing business in said State, switching regulations, or that the imposition of such switching regulations interfered with interstate commerce where such traffic had arrived in said State, and is destined to points of delivery within said State.

5. The court erred in holding that as appellee had a live-stock depot in Louisville it could not be required to deliver to appellant via the Southern Railway Company in Louisville, Kentucky, at the point of physical connection between the two roads, live stock in carloads coming over its lines destined to the Central stock yards, or commission merchants doing business thereat, on the line of the Southern Railway Company.

6. The court erred in holding that the service performed by the Southern Railway Company in making delivery of live stock destined to the appellant, and coming to the city of Louisville, Kentucky,

over the lines of appellee was anything other than a switching movement purely local in its character, or that the same had any relation whatever to any through or interstate rate fixed beforehand.

7. The court erred in holding that the contract of appellee with the Bourbon Stock Yards Company is valid and enforcible as to interstate traffic notwithstanding such traffic may be directed
145 by the shipper to be delivered to appellant or at some other point than the Bourbon stock yards.

8. The court erred in affirming the judgment of the United States circuit court for the western district of Kentucky herein.

Wherefore, your petitioner prays an appeal, as aforesaid.

J. C. DODD,
W. M. SMITH,
JOHN L. DODD,
Attorneys for Central Stock Yards Company, Appellant.

And on the same day to wit on October 18th, 1902 an appeal bond was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee. } Bond.

Know all men by these presents, that we, the Central Stock Yards Company, as principal and the Fidelity & Deposit Company of Maryland, as surety, are hereby held and firmly bound unto the Louisville & Nashville Railroad Company in the full sum of five hundred dollars to be paid to it, for which we hereby bind ourselves and executors firmly by these presents.

The condition of the above obligation is such that whereas the above-bounden principal has this day prayed and had allowed to it an appeal from the judgment of the United States circuit court of appeals for the sixth circuit, rendered on the 8th day of July,
146 1902, in the case of Central Stock Yards Company, appellant, *vs.* The Louisville & Nashville Railroad Company, appellee:

Now, therefore, the condition of this obligation is such that if the above-named principal obligor shall prosecute said appeal to effect and answer all costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CENTRAL STOCK YARDS CO.,
By JOHN L. DODD, *Att'y.*

FIDELITY & DEPOSIT CO. OF MD.
By SPENSER M. JONES,
Resident Vice-President.
By JOHN P. RYAN,
Resident Assistant Secretary.
Attest:
[SEAL.] B. E. DILLEY, *D. C.*

And on the same day to wit on October -3th 1902, notice of petition for appeal was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee. } Notice.

To appellee, Louisville & Nashville Railroad Company, or Helm, Bruce & Helm, its attorneys of record:

Appellee is hereby notified that appellant in the above-entitled cause will, on Monday October 13, 1902, at or about the hour of 9.30 a. m., or as soon thereafter as it can be heard, file a peti-
147 tion in the above-entitled court asking an appeal from the judgment rendered herein on the 8th day of July, 1902, to the Supreme Court of the United States, and therewith file an assignment of errors and tender such bond as may be required by the court in the prosecution of said appeal. Copy of the petition and assignment of errors *are* herewith delivered to you.

JOHN L. DOOD,
J. C. DODD,
W. M. SMITH,
Counsel for Appellant.

Service of the foregoing notice and copy of petition and assignment of errors is acknowledged this 10th day of October, 1902.

HELM, BRUCE & HELM,
Counsel for Appellee, Louisville & Nashville Railroad Company.

And afterwards to wit on October 15th 1902, an order approving appeal bond was entered which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee. } Order Approving Appeal Bond.

This day came the counsel for the appellant, Central Stock Yards Company, and presented its appeal bond in the sum of five hundred dollars, with the Fidelity & Deposit Co. of Md. as surety, which said bond is approved and ordered to be filed.

HORACE H. LURTON,
Circuit Judge.

148 And on the same day to wit on October 15th 1902, an order granting said appeal was entered which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

The appellant having filed its petition for the allowance of an appeal from the decree of this court to the Supreme Court of the United States, together with its assignment of errors, said appeal is hereby allowed and the bond is fixed at five hundred dollars.

HORACE H. LURTON, SR.,
Circuit Judge.

149 United States Circuit Court of Appeals for the Sixth Circuit.

CENTRAL STOCK YARDS COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee. } No. 1070.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, } *ss:*

To the Louisville & Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the session of the United States Supreme Court, to be holden at the city of Washington, on the 10th day of November next, 1902, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein The Central Stock Yards Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14 day of October, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and —.

HORACE H. LURTON,
Circuit Judge and Presiding Judge of the U. S. Circuit Court of Appeals in Above Cause.

Service of the above citation is hereby acknowledged and a copy thereof received by us.

October 16th, 1902.

HELM, BRUCE,
Counsel for Appellee.

[Endorsed:] No. 1070. U. S. circuit court of appeals, sixth circuit. Central Stock Yards Company *vs.* Louisville & Nashville Railroad Company. Citation.

150 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Central Stock Yards Co. *vs.* Louisville & Nashville Railroad Co., No. 1070, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 17th day of October, A. D. 190–.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,710. U. S. circuit court of appeals, 6th circuit. Term No. 482. The Central Stock Yards Company, appellant, *vs.* The Louisville and Nashville Railroad Company. Filed October 25", 1902.

FILE COPY. 1354

No. 482. 149

Supreme Court of the United States,

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
DEC 9 1903
JAMES H. McKENNEY,
Clerk.

THE CENTRAL STOCK YARDS COMPANY, - - - - *Appellant*,

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

J. C. DODD,
W. M. SMITH,
W. D. WASHBURN,
Counsel for Appellant.

JOHN L. DODD,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.



13545

Supreme Court of the United States,

OCTOBER TERM, 1902.

THE CENTRAL STOCK YARDS COMPANY, - - - - - - - *Appellant,*

No. 482. *VERSUS*

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - *Appellee.*

Brief for Appellant.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT.

This action is before this court upon an appeal from the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the United States Circuit Court for the Western District of Kentucky, dismissing appellant's bill of complaint for want of jurisdiction in equity of the matters alleged and for want of equity in the said bill.

The bill (see Record, 1 to 10) was filed January 11, 1902, and therefrom it appears that the appellant, Central Stock Yards Company, was and is a duly and legally authorized and organized corporation under the laws of the State of Delaware, and as such, from compliance with the Constitution and laws of the State of Kentucky, authorized to contract and be contracted with, sue and be sued in its corporate name, and to construct and operate a general stock yard business in said State.

The appellee, Louisville & Nashville Railroad Company, is, and was at the times in the bill of complaint mentioned, and has been for many years, a railroad corporation, created and organized under and by virtue of the laws of the State of Kentucky, with power, in its corporate name, to contract and be contracted with, sue and be sued, and to conduct and operate a steam railroad in and through Kentucky and elsewhere, with its chief office and terminus in Louisville, Kentucky; that it is, and has for years been operating and maintaining a railroad in Kentucky and in the States of Tennessee, Alabama, Georgia, Mississippi, Louisiana, Florida, Indiana, and Illinois, and as such is a common carrier of passengers and freight, and engaged in the transportation of passengers and property wholly by railroad along some of its lines, and partly by railroad and partly by water on other of its lines, under a common control, management, and arrangement for a continuous carriage and shipment from one State in the United States to another State in the United States.

The Southern Railway Company in Kentucky, is and was at the times in the bill of complaint mentioned, a duly created, organized, and operating railway system, in Kentucky, under the laws of said State.

It appears from the bill (see Record, 2) that appellant had, prior to the filing of its bill, constructed and had in operation a large and extensive plant just outside of the city of Louisville, and on the lines of the Southern Railway Company in Kentucky; and the appellant at said time and now has a modern and well equipped plant, with the latest improved and best facilities, and with ample capital and premises for receiving, unloading, feeding, watering, caring for, weighing, and having sales made of live stock of every character, and on the most economical basis; and that appellant, with the said Southern Railway Company in Kentucky, had, at the time of the filing of the bill, and now has, constructed switches and over four thousand feet of trackage connecting the said Southern Rail-

way Company system with the yards and plant of appellant; that appellant's plant is on the line of the Southern Railway Company, and about nine miles from its terminus in the city of Louisville, and that prior to the filing of the said bill the said Southern Railway Company had regularly established a station at the plant of appellant, which is known as Central Stock Yards, Kentucky, and that said Southern Railway Company, prior to the filing of said bill, had, in due form and in the usual manner, given notice of the establishment of said station to all of its agents, and to all connecting railways or common carriers in Kentucky, including appellee; and it further notified all of said railways and common carriers entering the city of Louisville, that it, Southern Railway Company, would be, after November 1, 1901, and that it ever since has been, and is now, ready, willing and able to accept at points of physical connection between its tracks and those of appellee at Louisville, Kentucky, live stock of every character consigned to appellant, or to any person, firm, or corporation at Central Stock Yards, Kentucky; and further that it, Southern Railway Company, would be, has ever since been, and is now, willing to be responsible to such connecting common carrier for the delivery of all such live stock delivered to it at such points of connection and the collection of all charges on same, and would promptly return to such points of connection all empty cars.

It further appears from the bill (see Record, 3 and 4) that there are three points of physical connection between the tracks of appellee and the said Southern Railway Company in Kentucky, at Louisville, at which the two railway systems have heretofore received and delivered, and are daily receiving and delivering each one to the other, and from the other, freight in car load lots or less for delivery to consignees on the track or tracks of the one or the other.

Prior to the filing of appellant's bill the appellee announced its intention to, and has ever since refused, and

now refuses to receive, bill, transport, transfer, switch, or deliver any live stock—the shipments of which originate outside of the State of Kentucky—consigned or tendered to be consigned to any point of physical connection between its said line and the lines of the said Southern Railway Company in Kentucky, at Louisville, Kentucky, destined to appellant at Central Stock Yards, Kentucky, or destined to any individual, partnership, firm or corporation at Central Stock Yards, Kentucky, although requested so to do by shippers, owners, and dealers in live stock.

When live stock is tendered to defendant in error at any of its stations outside of the State of Kentucky for consignment to appellant, or to any person doing business at the plant of appellant, via Southern Railway Company in Kentucky, at Louisville, appellee refuses to receive, bill, or transport the said live stock so destined, or to deliver the same to the Southern Railway Company at Louisville, or communicate to the Southern Railway Company the destination thereof, but in all of such cases appellee will only receive, bill, and transport the said live stock, so tendered to it, to Louisville, Ky., and when such consignment reaches the city of Louisville appellee refuses to deliver the same to the Southern Railway Company for delivery at appellant's plant, or to any person thereat, and refuses to give to the connecting common carrier (Southern Railway Company) the instructions of the owner and consignor of such live stock, but in all such instances, over the protest and objection of the owners of such live stock, appellee makes delivery thereof to the Bourbon Stock Yards Company, in Louisville, Ky., a rival and competitor in business of appellant.

Appellee undertakes to justify its conduct in this regard under and by virtue of a contract made by it on the 20th day of September, 1888, with the Bourbon Stock Yards Company, whereby appellee and the said Bourbon

Stock Yards Company agreed and contracted with each other as follows, viz.:

> "4. First party agrees that it will not lease, rent, or sell any of its ground, in the city of Louisville, for the establishment of a stock yard, or otherwise facilitate the establishment of a stock yard in the said city, and it will establish no other stock depot in the said city, and that it will deliver, and cause to be delivered, to the second party, so far as it legally may, all live stock shipped over the roads of the first party and consigned to the city of Louisville, and should any live stock be shipped to other person or persons in said city, the first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city, and agrees to unload all live stock shipped to said city at the address of the second party, but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court, or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions, and the second party shall, at its own cost and expense, defend any and all litigation which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom." (See Record, pages 6 and 7.)

The bill charges that the acts and conduct of the appellee, as a common carrier of passengers and freight of all kinds and description is unlawful and in disregard of its duties to appellant and the public, and in violation of the constitution and laws of the United States, and particularly of the Act of the Congress of the United States, approved February 4, 1887, and known as "An Act to Regulate Commerce," and especially the third section thereof and the amendments to said Act.

The bill shows the very great injury inflicted upon appellant by the acts and conduct of the appellee; that it has no ample or adequate remedy at law for the injuries to its business, and that if required to institute an action for

damages upon each and every refusal of appellee to receive, bill, transport, transfer, switch, and make delivery of such interstate stock to the Southern Railway Company with the destination thereof made known to such connecting carrier accordingly as directed by the shipper, great delay will be occasioned to the shippers, damage occasioned to the live stock, and damage to appellant from its failure to receive the live stock for care, attention, and feeding; and that the business of appellant, by the continued unlawful conduct of appellee, will be disrupted and totally ruined; and that separate and distinct actions at law will be wholly inadequate to the injury so inflicted.

Appellee filed an amended bill (see Record, pages 11 and 12), alleging:

> "That since the enactment by the Congress of the United States of the act known as 'An Act to Regulate Commerce,' passed February 4, 1887, and amendments thereto, the Commonwealth of Kentucky has, by constitutional provisions and legislative enactments, in aid of commerce, imposed certain duties upon all common carriers, and that by mandatory self-executing constitutional requirements of the Commonwealth of Kentucky all railroad companies organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, or doing a railroad business in this State, are required to receive, transfer, deliver and switch empty or loaded cars, and to move, transport, receive, load or unload all freight in car loads or less quantities coming to or going from any railroad, transfer, belt line, bridge, or siding thereon with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback, or rebate in favor of any person, corporation, consignee or consignor in any matter as to payment, transportation, handling, or delivery, and that all railroad companies doing business in this State shall so receive, deliver, transfer, and transport all freight from any and to any point where there is a physical connection between the tracks of said companies; and further, under the Constitution and laws of the State of Kentucky, it is made unlawful for any railway, transfer, belt line or railway bridge company to make any exclusive

or preferential contract or arrangement with any individual, association, or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier, and that the acts and conduct of the defendant complained of in its original bill are in violation of the Constitution and laws of the State of Kentucky, and it pleads and relies thereon in aid of the act of Congress of the United States, and known as 'An Act to Regulate Commerce.'"

The third, eighth, and ninth sections of the Act to Regulate Commerce, and the constitutional provisions and legislative enactments in aid thereof, read as follows, viz.:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (See Record, pages 60 and 61.)

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the pro-

visions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

"In any such action brought for the recovery of damages the court before which the same shall be pending, may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Secs. 213 to 217 of the Constitution of Kentucky:

"Sec. 213. *Freight and cars to be handled and transported without discrimination.* All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee, or consignor, in any matter as to payment, transportation, handling or delivery;

and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

"Sec. 214. *Exclusive or Preferential Contract Forbidden.* No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association, or corporation, for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier."

"Sec. 215. *Freight to be Transported and Handled for all Persons on Same Terms.* All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

"Sec. 216. *Tracks of Different Railways may Intersect and Unite.* All railway, transfer, belt lines, and railway bridge companies shall allow the tracks of each other to unite, intersect, and cross at any point where such union, intersection and crossing is reasonable or feasible."

"Sec. 217. *Penalties for Violation of Four Preceding Sections.* Any person, association, or corporation, willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, or two hundred and sixteen, shall, upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense, five thousand dollars; and for the third offense, shall thereupon, *ipso facto*, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, it shall, *ipso facto*, forfeit its right to do business in this State; and the Attorney-General of the Commonwealth, shall, forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections."

Sections 818 and 819 of the general laws of Kentucky, of 1894, read:

"818. *Preference or advantage forbidden—rules defining same quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. . . .

Sec. 819. *Penalty and damages for extortion, discrimination, preference—jurisdiction—duty of commission—limitation.* Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty, as aforesaid, and the Franklin Circuit Court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable, in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorney's fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

The prayer of the bill and amended bill, in conformity with which a mandatory order of injunction was asked, and upon

which the action was determined, reads as follows (see Record, page 9):

> "That the defendant, the Louisville & Nashville Railroad Company, be, by mandatory order of injunction, immediately ordered and required to receive, bill, transport, transfer, switch and deliver any and all shipments of live stock tendered to it outside of the State of Kentucky, consigned or tendered to be consigned, to any point of physical connection between its said line and the line of the Southern Railway Company in Kentucky, destined to the Central Stock Yards Station, Ky., or to the Central Stock Yards, Ky., or any such live stock consigned to any individual, partnership, firm or corporation at said Central Stock Yards, Ky., or at said Central Stock Yards Station, Ky., or via the Southern Railway Company in Kentucky, *destined* to said yards or station, and that it also be required, whenever so requested by the consignor and consignee or owner of said stock, at any of its stations, to recognize the right of said parties to change the destination of said shipment; and that it be required to change said destination and make delivery thereof at one of the points of physical connection between the tracks of said defendant's line and the tracks of the Southern Railway Company in Kentucky, for delivery by the said Southern Railway Company at the Central Stock Yards Station, Ky., or to whomsoever there consigned."

At the hearing on said motion appellant read its bill of complaint and amended bill of complaint, and the affidavits of the following-named parties and all exhibits therewith, viz.: B. H. Hurt (see Rec., p. 37), T. C. Powell (see Rec., p. 25), S. A. Stalcup (see Rec., p. 23), J. W. Byrne (see Rec., pp. 28 to 33 inclusive), J. E. Miller (see Rec., pp. 33 to 35), W. A. Evans (see Rec., p. 22), and R. C. Watkins (see Rec., pp. 36 and 37), and the blank printed form of a live-stock contract in use by defendant in error (see opposite Rec. p. 58).

The appellee read its answer (see Rec., pp. 44 to 50) as an affidavit, and the affidavits and exhibits therewith of the following-named parties, viz.: Walker D. Hines (see Rec., pp. 12 to 17 and pp. 51 to 56 inclusive), M. H. Smith (see

Rec., p. 56), M. J. Reedy (see Rec., p. 57), and C. R. Brent (see Rec., pp. 57 and 58).

On the 23d day of January, 1902, the trial court delivered a written opinion, in passing upon the motion for an injunction, and overruled the said motion. (See Rec., pp. 59 to 64.)

On the 24th day of January, 1902, the trial court, of its own motion, entered a final decree dismissing the plaintiff in error's bill of complaint, which said decree reads as follows:

> "And on another day of said term of said court, to wit, on the 24th day of January, 1902, came again the parties complainant and defendant by their respective counsel of record, and it now appearing to the court that it has not jurisdiction in equity of the matters alleged in the bill of complaint herein, upon consideration thereof, it is now, therefore, by the court ordered, adjudged, and decreed that the complainant's bill be and it is now dismissed, but without prejudice to the complainant's right to pursue any other remedies it may have upon the matters alleged by it, to all of which the complainant excepts.
>
> "It is further ordered, adjudged and decreed that the defendant have and recover of the complainant its costs herein expended, to be taxed by the clerk, and it may have execution therefor, to all of which the complainant excepts." (See Rec., pp. 64 to 65.)

From this decree an appeal was prayed (see Rec. 65), granted and allowed to the Circuit Court of Appeals for the Sixth Circuit, assigning errors (Rec., 66), and praying for a reversal of the aforesaid judgment of the Circuit Court.

Said appeal having been duly perfected in the United States Circuit Court of Appeals (Rec., 67 to 70) the Court of Appeals thereafter, on the 8th day of July, 1902, rendered an opinion (Rec. 70 to 78) affirming the judgment of the Circuit Court. Afterward, on the 25th day of August, 1902, a petition for a rehearing was duly filed in the said Circuit Court of Appeals (Rec. 78 to 102), in which petition appellant prayed for a rehearing on the ground that the opinion of the Court of Appeals appeared to be based upon a misconception of the

nature of the relief prayed for. This petition was denied on October 7, 1902 (Rec., 102), and later, on the 13th of October, the appellant filed in the United States Circuit Court of Appeals a petition for appeal (Rec. 103). The appeal having been duly perfected (Rec. 105 to 106) an order was entered on October 15, 1902 (Rec. 106), granting an appeal to this court.

Upon this appeal the following errors are assigned:

ASSIGNMENT OF ERRORS.

1. The court erred in holding that under the Interstate Commerce Act, and particularly the third section thereof, the appellee could not be required to receive, bill, transport, transfer, switch, deliver, and interchange interstate live-stock traffic, consigned to appellant, with the Southern Railway Company in Kentucky at points of physical connection between the two lines.

2. The court erred in holding that to require appellant to show the destination of interstate live-stock traffic consigned to appellant in its billing thereof, and to transport, transfer, switch, and deliver the same to appellant via the Southern Railway Company for delivery purposes, would be the judicial making of a joint tariff between the Southern Railway Company and appellee, or any division of through rates.

3. The court erred in holding that the provisions of the Constitution of Kentucky, relied on, are in any respect, in conflict with the Interstate Commerce Act, or in any manner attempted to regulate interstate commerce.

4. The court erred in holding that the State of Kentucky could not, by constitutional requirement or legislative enactment, impose upon common carriers doing business in said State, switching regulations, or that the imposition of such switching regulations interfered with interstate commerce where such traffic had arrived in said State, and is destined to points of delivery within said State.

5. The court erred in holding that as appellee had a live-stock depot in Louisville, it could not be required to deliver to appellant via the Southern Railway Company in Louisville, Ky., at the point of physical connection between the two roads, live stock in car loads coming over its lines destined to the Central Stock Yards, or commission merchants doing *business thereat*, on the line of the Southern Railway Company.

6. The court erred in holding that the service performed by the Southern Railway Company in making delivery of live stock destined to the appellant, and coming to the city of Louisville, Ky., over the lines of appellee, was anything other than a switching movement purely local in its character, or that the same had any relation whatever to any through or interstate rate fixed beforehand.

7. The court erred in holding that the contract of appellee with the Bourbon Stock Yards Company is valid and enforcible as to interstate traffic notwithstanding such traffic may be directed by the shipper to be delivered to appellant or at some other point than the Bourbon Stock Yards.

8. The court erred in affirming the judgment of the United States Circuit Court for the Western District of Kentucky herein.

POINTS AND AUTHORITIES.

I.

The remedies provided in Sections 8 and 9 of the Interstate Commerce Act are in addition *to the remedies existing* at common law, and the bill being predicated also upon the Kentucky constitution and statutes, the Circuit Court has jurisdiction. Any possible doubt on this question is settled by the Elkins Law.

Thompson v. Allen County, 115 U. S. 554;
Boyce v. Grundy, 3 Peters, 215;
Foster's Fed. Prac., Vol. I, page 9.
Little Rock, etc., R. R. Co. v. E. T. R. R. Co., 47 Fed. 772;
Interstate S. Y. Co. v. R. R. Cos., 99 Fed. 483;
U. P. Bk. v. City, 111 Fed. 563;
Davis v. Wakelee, 156 U. S. 681;
Watson v. Sutherland, 5 Wall. 74;
Rathbone v. Warren, 10 Johns, 587;
King v. Baldwin, 17 Johns, 384;
Am. Ins. Co. v. Fisk, 1 Paige, 90;
Teague v. Russell, 2 Stew. (Ala.) 420;
Southampton D. Co. v. S. H. & P. B., L. R. 11 Eq. 254;
Weymouth v. Boyer, 1 Ves. Jr. 416;
Vincent v. C. & A. R. R. Co., 49 Ill. 33;
Toledo, A. A. & N. M. R'y Co. v. Penn. Co., 54 Fed. 730;
Atty.-Gen. v. Mid. Kent. Ky. Co., L. R. 3 Ch. App. 100;
Elkins Act (an Act regulating, etc., approved Feb. 19, 1903);
Missouri Pac. v. U. S., 189 U. S. 274;
U. S. v. Michigan, 122 Fed. 544.

II.

The interest of appellant as consignee and the party injured by the discrimination complained of is sufficient to enable it to maintain the bill.

Record, 9;
Weber v. Gage, 39 N. H. 182;
Story's Eq. Pl., Sec. 730 and authorities;

Elkins Act, Sec. 2;
Interstate S. Y. Co. v. I. U. R'y Co., 99 Fed. 472;
Vincent v. C. & A. R. R. Co., 49 Ill. 33.

III.

No prayer for through billing is contained in the bill: the prayer is that the defendant be compelled to accept any and all stock tendered to it for points of connection with the Southern Railway Company and to deliver the same to the Southern Railway with direction as to its destination, and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock.

C. N. & St. P. R'y Co. v. Becker, 32 Fed. 849;
Iowa v. C. N. & St. P. R'y Co., 33 Fed. 391;
Am. and Eng. Ency. Law, 2d Ed., Vol. 5, p. 166;
Galena & C. U. R. R. Co. v. Rose, 68 Am. Dec. 574;
Am. and Eng. Ency. Law, 1st Ed., Vol. 25, p. 904;
Dorsey v. Cock, 4 Bibb, 45;
Tibbs v. Timberlake, 4 Littell, 16;
Dorsey v. Barbee, Littell's Select. Cases, 205;
Stapp v. Phelps, 7 Dana, 300;
Stanford v. Farmers Bk., 1 Bush, 340;
Mundy v. Kean's Admr., 5 Ky. Law Rep. 697;
Jones v. Strode, 19 Ky. Law Rep. 118.

IV.

Under the common law, the Interstate Commerce Act and the Constitution and statutes of the State of Kentucky, the appellee is required, as a common carrier, to receive, transport, and deliver freight of all kinds and cars of freight tendered by shippers and consignors at any point on its line, and to deliver the same to the Southern Railway Company at its points of connection with the line of the appellee company, in every case where the consignor specifically

orders that freight or cars of freight shall be so delivered to said the Southern Railway Company, and the appellee is required to carry, in accordance with such specific instructions, without discrimination and for reasonable charges.

Sec. 3, Interstate Commerce Act, Vol. 1, 2d Ed. U. S. Supp. 529;
Ky. Constitution, Sec. 213;
Elliott on Railroads, Col. 4, Secs. 1432 and 1440;
North v. Merchants Trans. Co., 146 Mass. 315;
Palmer v. C. etc. R. Co., 56 Conn. 137;
Little Miami R. Co. v. Washburn, 22 Ohio St. 324;
R. R. Co. v. Mfg. Co., 16 Wall. 318;
Myrick v. M. C. R. R. Co., 107 U. S. 106;
Penn. R. R. Co. v. Jones, 155 U. S. 333;
Dana v. N. Y. C. R. R. Co., 50 How. Pr. 428;
Bosworth v. Chicago R'y Co., 87 Fed. 72;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Vincent v. C. & A. R. R. Co., 49 Ill. 41;
In Re Peterson, 21 Fed. 889;
M. S. & I. R. Co. v. Day, 20 Ill. 375;
Beers v. Wabash, etc., R'y Co., 34 Fed. 244;
Forsyth v. Walker, 9 Pa. St. 148;
L. & N. R. R. Co. v. Odill, 33 S. W. 611 (Sup. Ct. Tenn.)
Johnson v. N. Y. C. R'y Co., 33 N. Y. 610;
McDonald v. W. R. R. Co., 34 N. Y. 497;
Hewett v. C. B. & Q. R'y Co., 63 Ia. 611;
C. B. & Q. R'y Co. v. B. C. R. & N. R'y Co., 34 Fed. 481;
Inman v. St. L. S. W. R. Co., 37 S. W. 37 (Tex.);
Dinsmore v. L. C. & L. R'y Co., Flippin, 672 (C. Ct. Tenn.);
McCoy v. C. I. St. L. & C. R'y Co., 13 Fed. 3;
Mo. Pac. R'y Co. v. W. W. G. Co., 40 Pac. 899 (Kas.);
Peoria & P. U. R'y Co. v. R. R. Co., 109 Ill. 135;
L. & N. R. R. Co. v. Williams, 95 Ky. 199;
Jacobson v. W. M. & P. R. R. Co., 179 U. S. 287;
B. C. R. & N. R'y Co. v. Day, 82 Ia. 312;
M. C. R. R. Co. v. Smithson, 45 Mich. 212;
C. G. W. R'y Co. v. Armstrong, 62 Ill. App. 228;
Worcester v. Norwich & W. R. Co., 109 Mass. 112;
People v. Duchess & C. R. Co., 58 N. Y. 152;
People v. Boston & A. R. R. Co., 70 N. Y. 569;
People v. N. Y. L. E. & A. R. Co., 104 N. Y. 58.

V.

The duty of the appellee as a common carrier is not discharged until it delivers the freight or car of freight to the point of specified connection and furnishes to the agent of such known specified connection the instructions of the consignor or shipper as to the further carriage or delivery of the freight or car of freight.

Bosworth v. C. etc. R'y Co., 87 Fed. 72;
R. R. Co. v. Mfg. Co., 16 Wall. 318;
Vincent v. C. & A. R. R. Co., 49 Ill. 41;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Selma & Meridian R. R. Co. v. Butts, 43 Ala. 385;
Little Miami R. R. Co. v. Washburn, 22 Ohio St. 324;
Colfax Mt. & F. Co. v. S. P. R'y Co., 46 Pac. 668;
Dana v. N. Y. C. & H. R. R. Co., 50 How. Pr. 425;
McDonald v. Western R. Co., 34 N. Y. 497;
Hewett v. R. Co., 63 Ia. 611.

VI.

The provisions of the Kentucky Constitution and statutes not being in conflict with the Interstate Commerce Act are in the nature of reasonable regulations in aid thereof, and will be enforced by the Federal courts.

Munn v. Ill., 94 U. S. 125;
Sanford v. R. R. Co., 24 Pa. St. 378;
Chicago, etc., R'y Co. v. Becker, 32 Fed. 349;
State v. Chicago, etc., R'y Co., 33 Fed. 391;
Jacobson v. W. M. & P. R. R. Co., 179 U. S. 297;
B. C. R. & N. R. R. Co. v. Dey, 82 Ia. 312;
P. & P. Q. R. Co. v. C. R. I. & P. Co., 109 Ill. 135;
M. C. R. R. Co. v. Smithson, 45 Mich. 212;
Inman v. St. L. S. W. R. Co., 37 S. W. 37;
L. & N. R. R. Co. v. Williams, 95 Ky. 199;
W. U. Tel. Co. v. James, 162 U. S. 650;
L. S. & M. S. R'y Co. v. Ohio, 173 U. S. 285;
Smith v. Alabama, 124 U. S. 465;

Sherlock v. Alling, 93 U. S. 99;
State Tax on Railway Receipts, 15 Wall. 284;
Mobile Co. v. Kimball, 102 U. S. 691;
Bagg v. Railroad, 109 N. C. 279;
W. U. Tel. Co. v. Howell, 95 Ga. 194;
Same v. Bright, 90 Va. 778;
Morgan S. S. Co. v. La., 118 U. S. 455;
Train v. B. D. Co., 144 Mass. 523;
Wilton v. Missouri, 91 U. S. 275;
R. R. Co. v. Fuller, 17 Wall. 560;
Atchison, etc., R'y Co. v. Denver R. R. Co., 110 U. S. 667;
People v. B. & A. R. R. Co., 70 N. Y. 569;
People v. R. R. Co., 104 N. Y. 58;
Olcott v. Supervisors, 16 Wall. 678;
Cherokee v. S. K. R'y Co., 135 U. S. 641;
U. S. v. J. T. Ass'n, 171 U. S. 505;
Commonwealth v. Alger, 7 Cushing, 53;
Cooley's Cont. Lim. (6 ed.), p. 715;
L. & N. R. R. Co. v. Kentucky, 161 U. S. 701;
Plumby v. Mass., 155 U. S. 462;
R. & A. R. R. Co. v. Tobacco Co., 169 U. S. 311;
C. M. & St. P. R'y Co. v. Solan, 169 U. S. 133;
L. & N. R. R. Co. v. Coal Co., 23 Ky. Law Rep. 118;
L. & N. R. R. Co. v. Ky., 183 U. S. 503;
Penn. R. R. Co. v. Miller, 132 U. S. 75;
L. W. Co. v. Clark, 143 U. S. 1;
N. Y. L. E. & W. R. R. Co. v. Penn, 158 U. S. 431;
Bridge Co. v. Ky., 166 U. S. 150;
M. & St. L. R. R. Co. v. Minn., 186 U. S. 257;
N. Ch. & St. L. R. Co. v. Ala., 128 U. S. 96.

VII.

The contract of the appellee with the Bourbon Company to deliver to it all live stock brought by the defendant to the city of Louisville is contrary to public policy and void, and its operation should be prevented by the courts.

McCoy v. C. I. St. L. & C. R. Co., 13 Fed. 3;
L. E. & St. L. Consol. R'y Co. v. Wilson, 18 L. R. A. 105;
P. & R. I. Co. v. C. V. M. Co., 68 Ill. 489;
Inter-Ocean v. Associated Press, 184 Ill. 438;
C. & N. W. R'y Co. v. People, 56 Ill. 365;
Gaston v. B. & E. R. R. Co., 95 Eng. Com. Law, 641;

Sandford v. R. R. Co., 24 Penn. St. 382;
Rogers L. Co. v. Erie R. R. Co., 5 Green, 380;
State v. H. & N. R. R. Co., 29 Conn. 538;
Doolen v. Ward, 6 Johns, 194;
Hooker v. Vandewater, 4 Denio, 349;
Stanton v. Allen, 5 Denio, 434;
State v. H. & N. R. R. Co., 29 Conn. 538;
Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 502;
Bennett v. Dutton, 10 N. H. 481;
Anderson v. Jett, 89 Ky. 375;
Pueblo, etc., R. R. Co. v. Taylor, 6 Colo. 1;
St. J. & D. R. R. Co. v. Ryan, 11 Kan. 608;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Interstate S. Y. Co. v. Ind. U. R'y Co., 99 Fed. 472;
R'y Co. v. Dohn, 53 N. E. 937;
Parkinson v. R'y Co., L. R. 6 C. P. 544;
Ilwaco R'y Co. & Nav. Co. v. Oregon R. Co., 57 Fed. 673;
C. M. & St. P. R. R. Co. v. Wab. R'y Co., 61 Fed. 993 (and cases cited).
Gibbs v. Consol. Gas Co., 130 U. S. 396;
Thomas v. W. J. R. Co., 101 U. S. 71;
U. S. v. J. T. Assn., 171 U. S. 505.

I.

The remedies provided in Secs. 8 and 9 of the Interstate Commerce Act are in addition to the remedies existing at common law, and the bill being predicated also upon the Kentucky Constitution and statutes, the Circuit Court has jurisdiction. Any possible doubt on this question is settled by the Elkins Law.

The trial court held that by and under Secs. 8 and 9 of the Interstate Commerce Act (hereinbefore copied on pages 9 and 10) the remedy for violation of Sec. 3 of that Act is limited to an action for damages sustained in consequence of any such violation, with reasonable counsel fees to be fixed by the court, or of making complaint to the Interstate Commerce Commission for relief, and reliance upon said Commission to compel, through the courts, obedience to any order or orders it may make.

The principal question thus brought to our attention by the decision of the trial court therefore is: Whether or not the remedies provided for in Secs. 8 and 9 of said Act are exclusive of all other remedies.

We think it entirely clear from the authorities, and from the Act to Regulate Commerce itself, that all of the remedies afforded by law against common carriers are not embodied in the said Act to Regulate Commerce.

We find that in Section 22 of the said Act to Regulate Commerce, as amended March 2, 1889, and February 8, 1895, among other things it is provided:

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by this Act."

From an examination of the opinion of the trial court (see Rec., pages 59–64) it will be seen that the same is largely based upon the last few sentences of the opinion of this court in the case of Haycraft v. United States, 22 Wall. 98, reading as follows:

> "But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand, a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

That case was under the Captured and Abandoned Property Act of March 12, 1863, which said statute bears no analogy to the Interstate Commerce Act. That statute was distinctly a war measure, requiring the consent of the Government that it be sued, and the only action consented to under the said Act was one to be commenced within two years after the suppression of the rebellion. There was for the parties to be benefited by the Act in that case absolutely no right or remedy excepting such as was given by the said Act, and if a grant from Congress of the right and remedy was a condition precedent to the assertion thereof, certainly Congress had the right to prescribe limitations and restrictions upon such a right so granted, and this is all that was decided by that case.

The case of Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29, relied upon by the trial court, was and is a case wherein the bank, with its *situs* in Buffalo, N. Y., charged Dearing 10 per cent on a certain loan, which was usurious under the laws of New York, and the penalty pro-

vided therefor under the laws of New York was a forfeiture of the principal and interest, whereas under the act of Congress commonly known as the "National Banking Act," under which the bank in that case was organized, provided that for a charge of a usurious rate of interest the bank should forfeit the interest, with the right in the parties aggrieved to recover back twice the amount wrongfully paid, provided suit be brought within two years from the time the usurious transaction occurred. In the State courts of New York, wherein suit was brought, the State statute referred to was held valid and judgment rendered accordingly, and upon an appeal to this court it was held that State usury laws can not operate to cause a loss of entire debt due a national bank, or in other words, that State usury statutes are not applicable to paper discounted by national banks.

The case of Barnett v. National Bank, 98 U. S. 555, cited and relied upon by the trial court in support of its conclusion, is a case in which it was held that the Act of June 3, 1864, commonly known as the "National Banking Act," having prescribed the penalty for the taking of usury by a national bank, the remedy to the party aggrieved was confined to that act, and was and is exclusive.

Precisely the same question was decided in the case of Carter v. Carusi, 112 U. S. 478, cited and relied upon in support of the trial court's conclusion, the same differing only in that the Act in that case was the unlawful charge of interest under an Act of Congress for the District of Columbia.

To the same effect will be found the case of McBroom v. Scottish Investment Company, 153 U. S. 318, cited and relied on by the trial court in support of its conclusion.

The case of E. Tenn., Virginia & Georgia R. R. Co. v. Sou. Tel. Co., 112 U. S. 106 (erroneously cited by the trial court as being 122 U. S. 306), does not in the slightest extent, as we understand the case, support the reasoning or conclusion of the trial court. That case decides that a Federal court, with

jurisdiction over the parties, can award a right given solely by a State statute, but that in such a proceeding the Federal court can act only in accordance with the State statute creating the remedy, and for such purpose is only possessed of the powers conferred upon the State court.

This case supports our contention, and shows that the trial court had jurisdiction in equity of the matters alleged in the bill and amended bill of complaint, as confessedly the said court had jurisdiction over the parties by reason of the diversity of citizenship.

The allegations of the bill and amended bill of complaint, and the uncontradicted evidence in support thereof, as shown from the affidavits, particularly of J. W. Byrne and J. E. Miller (Rec., 28 to 35), show that the wrongs complained of to appellant, and to all persons and the public generally, desiring to do business at the yards of appellant, is of a continuous character; that said damage therefrom is not susceptible of actual pecuniary estimation; that actions at law would involve a multiplicity of suits, none of which would or could end the litigation, and these facts being conceded it necessarily results therefrom, as charged and proven, that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity.

This court, in the case of Thompson v. Allen County, 115 U. S. 554, in an opinion by Justice Miller, defined the legal meaning of inadequacy of the remedy at law, saying:

> "By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view."

In Boyce v. Grundy, 3 Peters, 215, it is said:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

See also Foster's Federal Practice, vol. 1, p. 9.

It will be observed from the trial court's opinion that the court conceded that the cases of Little Rock, etc., R. R. Co., v. E. Tenn. R. R. Co., 47 Fed. 772, and Interstate Stock Yards Company v. Railroad Companies, 99 Fed. 483, are against the conclusion reached in said opinion, but the failure to consider those cases was attempted to be justified on the idea that to the extent that Judge Hammond expressed his opinion contrary to that of the trial court such expression was mere dicta, and that in the Interstate Stock Yards Company case the want of power or jurisdiction in the Federal court to grant the relief was not raised, by demurrer or otherwise.

It is likewise true that no demurrer was filed to the bill and amended bill of complaint herein, though before the hearing the trial court furnished counsel for appellee with the authorities upon which his opinion is made to rest, with the suggestion that the question of power was initiatory in its character and raised itself in courts of the United States.

Learned counsel for appellee did not regard the authorities relied on by the trial court sufficiently pertinent to even fall in line and file a demurrer. While we have no complaint of the trial court's action, if right in its result, yet we believe that the conclusion so reached by the said court is adverse to all the elementary text-books, adjudicated cases, and the Act to Regulate Commerce itself.

This court, in the very recent case of Union Planters Bank v. City of Memphis, 111 Fed. 563, in an opinion by Judge Lurton, held that where complainant will be subjected to irreparable damage, or to a necessity of a multiplicity of suits, if compelled to rely upon his legal remedy alone, equity will interpose upon the ground of the inadequacy of the remedy at law. (Collating the authorities in support thereof.)

Judge Hammond, in the case of Little Rock, etc., R. R. Co. v. E. Tenn., etc., R. R. Co., 47 Fed. 774, in discussing the equity jurisdiction of the Federal court, concluded that

said court had such jurisdiction, notwithstanding the provisions of the Interstate Commerce Act prescribed certain remedies, and in doing so said:

> "There can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an Act of Congress, either at law or equity, has not been abbreviated by this Act in relation to controversies arising under it, but the special remedies, so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary act, which governs all our jurisdiction."

It seems to us that the conclusion of Judge Hammond, instead of being dicta, is in effect only adjudicating what the Act itself provides in the twenty-second section thereof, that

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

See especially Johnston v. Louisville, 11 Bush, 533.

We find in the case of Interstate Stock Yards Co. v. Railroad Companies, 99 Fed. 483, that Judge Baker has expressed the law sustaining jurisdiction in a case almost on all fours in its facts with the one under consideration with remarkable clearness, wherein he said:

> "The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does

not apply where the subject-matter of the litigation is to prevent discrimination in violation of the Interstate Commerce Act."

In the case of Davis v. Wakelee, 156 U. S. 681, it was stated by the court (page 688):

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit. Boyce v. Grundy, 28 U. S. 3 Pet. 210 (7:655); Watson v. Sutherland, 72 U. S. 5 Wall. 74, 79 (18:580, 582); Rathbone v. Warren, 10 Johns, 587; King v. Baldwin, 17 Johns, 384, 8 Am. Dec. 415; American Ins. Co. v. Fisk, 1 Page, 90; Teague v. Russell, 2 Stew. (Ala.) 457; Southampton Dock Co. v. Southampton Harbor Board, L. R. 11 eq. 254; Weymouth v. Boyer, 1 Ves. Jr. 416. Where equity can give relief plaintiff ought not be compelled to speculate upon the chance of his obtaining relief at law."

The case of Vincent et al. v. C. & A. R. R. Co., 49 Ill. 33, is, without doubt, one of the leading cases on carriers, and has always been quoted with approval. In this case, on the subject of the remedies, the court says (page 43):

> "But it is contended, finally, that even admitting the complainants have been wronged by the appellee, their only remedy is by action for the two months' storage and damages authorized by the statute. Various authorities are cited for the purpose of showing that where a new right has been created, and an adequate remedy for its invasion provided by the same statute, parties injured are confined to the statutory redress. This is doubtless true; but in this case the right is not new, nor is the remedy adequate. A new and enlarged remedy is given, but the right of the consignee to deliver is as old as the common law. The right, in this case, to resort to the restraining powers of a court of chancery, springs from the fact that the course pursued by the company will destroy or greatly injure the business of the appellants. This is evident, for if the tax of ($5.00) five dollars per car is charged by them to their correspondents, they would soon cease to receive shipments of grain, and if paid by

themselves, they would be placed at a ruinous disadvantage in comparison with their rivals in business. For such injuries the damages in a suit at law could furnish no just compensation, and therefore chancery will interfere. Webber v. Gage, 39 N. H. 182, and Watson v. Sunderland, 5 Wallace, 74, are authorities in point. A system of jurisprudence would be radically defective that could not interpose to prevent wrongs of this character, incapable, from their nature, of being redressed by damages."

As early as the case of Watson v. Sunderland, 5 Wallace, 74, the theory of the jurisdiction of the courts of equity in the absence of an adequate remedy at law was clearly laid down; in that case, Judge Davis said (page 79):

"The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleading."

One of the clearest cases on the question of the exclusiveness of the remedies provided under the Interstate Commerce Act is the case of Toledo, A. A. & N. M. R'y Co. v. Penn. Co., 54 Fed. 730; in that case the precise question was raised and passed upon that was raised by the trial court in this cause. In the opinion by Taft, Circuit Judge, page 732, it states:

"It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

Page 741: "Now the normal condition—the status quo—between connecting common carriers under the Interstate Commerce Law is a continuous passage of freight backward and forward between them, which each

carrier has a right to enjoy, without interruption, exactly as riparian owners have a right to the continuous flow of the stream without obstruction. Since Lord Thurlow's time, the preliminary mandatory injunction has been used to remove obstructions and keep clear the stream. Robinson v. Lord Byron, Brown Ch. 588; Lave v. Newdigale, 10 Ves. 192. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The Interstate Commerce Law recognizes the necessity for such a remedy, for in summary equity proceedings at the instance of Interstate Commerce Commission, provided by Section 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violation of the orders of the commission, is given to circuit courts. In addition to that, a remedy by mandamus in the district and circuit courts is given to an interested person to compel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated 'cumulative' in the statute, it does not prevent the remedy by injunction, nor would it, in any event, because the inadequacy of the legal remedy which justifies equitable intervention by injunction is only the inadequacy of the recovery in damages by action at law. Attorney-General v. Mid. Kent R'y Co., L. R. 3 Ch. App. 100."

It will be observed from above quotation that the court not only held that the remedies provided in the Interstate Commerce Act were not to be regarded as exclusive of all other remedies, but that it makes clear that in a case of this kind a mandatory injunction should be granted even under the Interstate Commerce law. The cases of

In re Debs, 158 U. S. 599, and
Chicago, B. & Q. R'y Co. v. Burlington, C. R. & N. R'y Co., 34 Fed. 481,

all sustain our contention, and show that the circuit courts of the United States have jurisdiction of a bill in equity not only to restrain violations of the Interstate Commerce law to the

irreparable injury of appellant, but that the duty imposed by the said Interstate Commerce Act and the State laws of Kentucky on common carriers that they shall receive from connecting roads freight in car load quantities or less are duties which the Federal courts can and should enforce by mandatory injunction, where, as in this case, the injury resulting from the non-performance of such duties is continuing and irreparable.

The Elkins Act.

We have devoted considerable space and attention to the question of the exclusiveness of the remedies provided in the Interstate Commerce Act, owing to the fact that the opinion of the trial court is almost entirely taken up with the discussion of this question. We can not but feel, however, that in the words of Judge Grosscup:

"The Elkins Act makes this discussion largely academic."

In our opinion, and we believe in the opinion of this honorable court, whatever question there might have been about the original jurisdiction of the circuit courts in actions of this kind has been entirely settled by the so-called Elkins Act (an act regulating commerce with foreign nations and among the States, approved February 19, 1903).

The jurisdiction conferred by the Elkins Act may be found from the following language:

Clause from Section 1: "Every violation of this section shall be prosecuted in the court of the United States having jurisdiction of crimes within the district in which such violation is committed or through which the transportation may have been conducted."

Clause from Section 2: "That in any proceedings where the enforcement of the provisions of the statute relating to the Interstate Commerce, whether such proceedings are instituted before the Interstate Commerce Commission or *be taken originally in any circuit court of the*

United States, it should be lawful to include as parties, etc., . . ." (Our italics.)

Clause from Section 3: ". . . and the proceedings provided for by this Act shall not preclude the beginning of suit for the recovery of damages by any party injured, *or any other action* provided by said Act approved February 4th, etc., . . ." (Our italics.)

Thus by the use of the disjunctive "or" in this last quotation it was the manifest intention of Congress to authorize the institution of a suit by any person aggrieved to recover any damages provided for in the Elkins bill, which "*should not preclude*" the institution of any other action provided in any other act not repealed by the Elkins bill.

This Act has been very recently interpreted by this Honorable Court, in the case of the *Missouri Pacific Railway* v. United States (189 U. S., page 274). In this decision it is said by Mr. Justice White, on page 283:

"Although by the fourth section of the act conflicting laws are repealed, it is provided 'but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law *and as modified by the provisions of this act.*' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it can not be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course, the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to."

Our understanding of this decision is, that the Elkins Act, being entirely remedial, applies to every violation of the Interstate Commerce law, irrespective of whether it transpired previously or subsequent to the passage of that act, and to every case in which such violation was at issue, pending at the time the act was passed. In this understanding, we believe that we are supported by the opinion of the *United States* v. *Michigan*, reported in the 122 Fed. at page 546. In this case the court says, in referring to the case of the *Missouri Pacific* v. the United States:

> "However, the Elkins Act makes this discussion largely academic. It is provided in terms, in that act, that the equity jurisdiction of the United States courts shall be extended to cover just such cases as this, and that suits may be brought by the Government at the instance of the Attorney-General. The only question left is, whether the act is applicable to a case the substantial facts of which transpired before its passage. The Elkins Act is remedial only. It extends the equitable jurisdiction of the court, not to every violation of the Interstate Commerce Law thereafter transpiring, but to every violation, irrespective of whether it transpired previously or subsequently. Such is the construction put upon it by the Supreme Court in the Kansas case referred to."

Under these two last decisions, therefore, we can not but feel that every question as to the jurisdiction of the Circuit Court in this case has been conclusively settled, and that without doubt the Circuit Court had original jurisdiction to entertain the action in the form as brought.

II.

The interest of appellant as consignee and the party injured by the discrimination complained of is sufficient to enable it to maintain the bill.

Considerable attention and space were devoted by counsel for appellee in the Court of Appeals to the argument that complainant is not the party in interest. Neither the trial court nor the Circuit Court of Appeals thought this question of sufficient importance to be worthy of any attention in their consideration of the case. On this point we are inclined to agree with both these courts.

The facts set out in the bill show that the complainant is the owner and maintains a very complete and extensive plant for the receipt, care, and distribution of live stock; that there are situated at this plant, numbers of commission merchants, to whom stock is consigned by various shippers throughout the country. It further appears that the complainant is paid its reasonable charges for the use of its yards and plant and for the services of its employes, and that unless the defendant is restrained and prevented from further failing, neglecting, and refusing to receive, bill, transport, transfer, switch, or deliver live stock destined for the Central Stock Yards, great and irreparable injury and damage will be caused the complainant and its business, resulting in its disruption and destruction. (Rec., p. 8.)

It further appears (Rec., p. 9) that complainant prays for a mandatory order of injunction compelling the defendant to receive, bill, deliver, etc., any and all shipments of live stock tendered to it outside of the State of Kentucky "consigned or tendered to be consigned to any point of physical connection between its said line and the line of the Southern Railway Company in Kentucky, destined to the Central Stock Yards Station, Kentucky, or to the Central Stock Yards, Kentucky,

or any such live stock consigned to any individual, partnership, firm or corporation at said Central Stock Yards, Kentucky, or at said Central Stock Yards Station, Kentucky, or via the Southern Railway Company in Kentucky, destined to said yards or station." (Rec., p. 9.)

In our conception it would be hard to state a case of facts in which the interest of the complainant would appear more clearly than in the facts set out in the bill. The amount of damage already done is, moreover, clearly alleged in figures (Rec. 9), and it is hard to believe that any one reading the facts as set forth in said bill would have any doubt as to the interest of the complainant in the questions at issue or the damage, past and future, which would result to the complainant from the alleged discrimination.

It seems almost unnecessary to cite authorities where the facts speak for themselves.

As stated by Judge Fowler in the case of *Webber* v. *Gage*, 39 N. H. 182 (on page 185):

> "It is not essential that the title of the complainant to the subject-matter of the bill should be directly and explicitly averred; it is sufficient, if facts are stated from which the court may infer a title." (Story's Eq. Pl., Sec. 730 and authorities.)

We might go on and cite many cases, which we shall cite later in our brief, in which the complainant under a condition of facts and averment of interest very similar to that set up in the bill herein has obtained the relief prayed for without the court's questioning or doubting its interest therein.

As stated in the Elkins Act heretofore referred to, Sec. 2, we believe that the law has always been that it is proper and lawful in any proceedings of this kind "to include as parties, in addition to the carrier, all persons interested or affected by the rate, regulation or practice under consideration."

In the case of *Interstate Stock Yards Co.* v. *Indiana Union Railway Company*, 99 Fed. 472, it was said, on page 483:

> "It (the compt.) simply asks that live stock consigned to it, or to persons doing business in its yards, or contracted in the bill of lading to be unloaded, fed, watered, and rested there, shall be delivered in accordance with the contract."

Similarly, in the case of *Vincent* v. *C. & A. R. R. Co.*, 49 Ill. 33, relief was granted to the complainant without any clearer or more distinct allegation of interest than that contained in the bill herein.

From the attitude of both courts below, however, we can not but feel we are justified in practically ignoring this point since, in our conception, the interest of the complainant as set forth in the bill is clear enough to convince even the veriest layman. Moreover, the defendant having answered and not demurred, we consider the point as conclusively waived and conceded.

III.

No prayer for through billing is contained in the bill; the prayer is that the defendant be compelled to accept any and all stock tendered to it for points of connection with the Southern Railway Company and to deliver the same to the Southern Railway with direction as to its destination, and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock.

As set forth in the petition for rehearing, in our opinion the Court of Appeals misconceived the nature and scope of the relief sought by the complainant.

In the opinion rendered by that court (Rec. 86), it is said:

> "It is averred in the bill that the Southern Railway Company has notified the respondent that it would be and now is willing to be responsible from points of physical connection with the Louisville & Nashville Railroad for the delivery of such live stock and the collection of all charges on the same, and would promptly return to all points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right, in the absence of statute, to dictate to carriers the contract they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters are to be determined by the contract between the parties. Each controls its own railroad and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern Railroad for the transportation and delivery of cars of live stock to the Central Stock Yards, if that can be assumed to be a station on the line of the Southern Railroad, nor do we think a court of equity has the power to make one and

supervise its execution, nor has this right been conferred upon the courts by the Interstate Commerce Act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it :

A. T. & S. R. R. v. D. N. O. R. R., 110 U. S. 667;
Express cases, 117 U. S. 1;
Pullman Palace Car Co. v. Missouri Pac. R'y Co., 115 U. S. 587;
N. Pac. R. R. v. Dustin, 142 U. S. 492;
Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567;
L. & N. R. R. Co. v. St. L. M. R. R., 41 Fed. 559;
Oregon Shortline Co. v. N. P. R. R., 51 Fed. 475;
St. L. Drayage Co. v. L. & N. R. R., 65 Fed. 39;
Allen & Lewis v. Oregon R. and Nav. Co., 98 Fed. 16."

It is respectfully submitted that in this conclusion the court was incorrect, because while it is alleged in the bill that the Southern Railway Company had notified the Louisville & Nashville Railroad Company that it would receive at such points of physical connection and be responsible for return of freight and immediately return all empties, it does not necessarily follow from the making of this offer by the Southern Railway that in order to grant the relief sought herein by complainant, the court should determine that such Louisville & Nashville Railroad Company should accept such proposition, although the facts in the case as shown clearly establishes that such arrangements had been entered into and carried into execution between said roads relating to all freight shipments, except such as were designated to this Central Stock Yards.

In the record of this case (between pages 58 and 59) is attached the Louisville & Nashville Railroad Company contract for the transportation of live stock over its lines, being such a contract as was suggested to the court upon the hearing should be entered into by the Louisville & Nashville Railroad as to shipments of live stock tendered it, destined to the Central Stock Yards, and by the very terms of said contract, Section 1, it is provided that the shipper releases the common

carrier from all liability, etc., if the shipment is destined to a point beyond said carrier's lines when the delivery is made to the connecting carrier.

It thus clearly appears that no interchange of JOINT TRAFFIC between these two roads is asked of the court, nor any THROUGH BILLING, nor is it sought to compel the Louisville & Nashville Railroad TO CARRY EXCEPT ON ITS OWN LINES. This court is simply asked to compel the Louisville & Nashville Railroad Company, as it is its duty to do, to receive shipments from owners and consignors of live stock, and to show upon said bill of lading, as in its live stock contract filed, THE DESTINATION OF SAID SHIPMENT, and to deliver same to the connecting carrier, as both at common law and statute it was and is its duty to do, and if such requirements are made by the court the initial carrier's responsibility would cease upon the delivery to the connecting carrier.

The authorities cited by the Court of Appeals may sustain the said statement made in the opinion, but it is respectfully submitted that in the case at issue this state of facts do not exist, as this bill does not seek to compel the defendants to enter into any JOINT TRAFFIC ARRANGEMENT OR THROUGH BILLING. By the terms of the live stock contract of the Louisville & Nashville Railroad filed, which is the usual and customary contract entered into by all roads, it is shown that the initial carrier's responsibility ceases whenever it delivers to the connecting carrier; and the law requires him to also deliver to such connecting carrier on the delivery of such freight the instructions of the shipper as to destination, and the contract filed shows a blank left to indicate the destination.

The bill in this case, briefly stated, simply asks that the defendant be compelled to receive, ship, transport, switch, and deliver TO THE CONNECTING CARRIER, and while it is stated in the body of said bill that the Southern Railway Company had agreed to be responsible for the collection of freights, etc., it is not asked that the mandatory injunction prayed for, require

defendant to ship under said arrangement with the Southern as to the said freight, but simply that it be required to receive and deliver, which necessarily means in the usual way and under the usual terms and conditions, but even had the bill asked that defendant be required to enter into this agreement with the Southern as to freight, still, although it might not be entitled to this requirement, if it shows upon its face that the defendant is violating a plain, legal duty, regardless of this allegation as to freights, the plaintiff is entitled to redress to the extent that it is necessary to be given to remedy the wrong and injury suffered. This allegation as to freight certainly can not deprive plaintiff of its legal rights, if they are shown to exist, although said freight arrangement may not be one of the elements of said right. It will not be deprived of what it is entitled to because it asks more.

The case presented as to the proposition of defendant's rights as to freights shows the following state of facts and law:

By the affidavit of T. C. Powell (Record, pages 25 to 28), the physical connection between these two roads is shown to exist, and that the movement required for delivery of cars from one road to the other is simply a *switching movement* and made within the switching limits of the city of Louisville, for which a fixed price of $2.00 is established, and can not be changed or varied by the initial carrier, and that therefore this charge can not and does not enter or become a part of the freight charge for the haul by the Louisville & Nashville Railroad from the point where said freight is received to the city of Louisville, and that therefore it is not and can not be a subject of through billing or traffic contract entered into by the two roads.

The court's attention is respectfully called to the case of Chicago N. & St. P. R'y Co. v. Becker and others, 32 Federal Reporter, page 849, as fully sustaining this last contention as to the switching movement.

Also to the State of Iowa v. Chicago, N. & St. P. R'y Co., 33 Federal Reporter, page 391.

It is thought that these cases are conclusive of this question.

As stated, the court is asked to require the defendant to receive and deliver to the connecting carrier. If the court grants such relief, it would certainly do so REQUIRING DEFENDANT TO RECEIVE AND DELIVER UNDER THE USUAL CUSTOM, TERMS, AND CONDITIONS, AND IN CONFORMITY TO THE LAW GOVERNING THE QUESTION OF FREIGHTS, and nothing more is asked or intended to be asked by said bill. If this be a correct statement of the law, as it is thought to be, then the question of the collection of freights from the point of reception to the point of delivery by the initial carrier is a matter dependent upon the wishes and demands of the said initial carrier, as in law he has the right to demand PREPAYMENT of such freights before any transportation of or delivery to the connecting carrier.

In the 2d edition of the the American and English Encyclopedia of Law, vol. 5, page 166, it is said:

> "Upon a demand therefor, by the carrier, a shipper is bound to prepay all freight charges on goods tendered for transportation,"

and a number of authorities are cited thereunder.

In Galena & Chicago U. R. R. Company v. Rose, 68th American Decisions, page 574 (quoting from the syllabus), it is said:

> "A railroad company may demand prepayment of freight charges, but in omitting such demands the company becomes bound to transport the freight according to its custom, and slight evidence of willingness to pay will be sufficient to support an action for damages caused by refusal to receive such freight."

Again it is said, in the American and English Encyclopedia of Law, 1st Edition, vol. 25, page 904:

> "The actual production of the money is not required where the party is ready and willing to pay it, but is pre-

vented by the creditor declaring that he will not receive it, or by his making any declaration equivalent to a refusal to accept it if tendered."

See cases cited in note thereunder as follows:

Dorsey v. Cock, 4 Bibb, 45;
Tibbs v. Timberlake, 4 Littell, 16;
Dorsey v. Barbee, Littell's Select. Cases, 205;
Stapp v. Phelps, 7th Dana, 301;
Sanford v. Farmers Bank, 1st Bush, 340;
Mundy v. Kaan's Admr., 5th Ky. Law Reporter, 697;
Jones v. Strode, 19th Ky. Law Reporter, 118.

Neither the bill in this case nor the answer shows that any prepayment of freight was demanded by the defendant of the shippers, but, on the contrary, said bill shows that defendant not only refused to receive such shipments destined to the Central Stock Yards, or to indicate said destination upon the contract of shipment, but that it issued its circular letter to all of its agents along its routes directing them not to receive such shipments, thereby making a tender of freight charges unnecessary, and it is further shown that even where such shipments were received, that when same arrived at the city of Louisville, instead of being delivered to the connecting carrier, they were unloaded at said Bourbon Stock Yards against the known request and wishes of the shippers.

The case of Little Rock & Memphis R. R. Co. and St. L. & Co. R. R., 63 Fed. 775, referred to in the opinion of the trial court, is wholly unlike the case at bar. In that case the connecting carrier, complained of, did not refuse to interchange traffic with the complainant common carrier, but exacted of complainant common carrier the prepayment of freight on all property received from complainant and because the said common carrier complained of did not require the prepayment of charges of their connecting common carriers it was claimed that such conduct was preferential and prohibited by the language of clause 3 of the Interstate Commerce Act.

In that case it was held that at common law a railroad had the undoubted right to require prepayment of freight charges from any or all of its customers as it might think best, but that for the common carrier complained of to exact prepayment of freight from the complainant in that action was not prohibited by the Interstate Commerce Act and that neither under the common law nor under the Interstate Commerce law had the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint traffic rates, but that in such matters such agreements of that character were for the common carriers themselves to make, as their better judgment might direct.

In all this we fully concur.

In the case of Oregon Short Line, etc., v. the Northern Pacific Railway Company, 51 Fed. 465, it was held that a common carrier could not be required under the 3d clause of the Interstate Commerce Act to receive freight in cars in which it is tendered by connecting carrier and transported in such cars, paying a mileage rate therefor when its cars were available for such service and the freight would not be injured by transfer.

In the case at bar, however, appellant does not ask that appellee be required to issue through bills of lading, but simply that appellee be required to indicate the destination of freight consigned to the Central Stock Yards, Kentucky, to the connecting carrier for delivery at Central Stock Yards, Kentucky, and deliver to said connecting carrier, Southern Railway Company, consignments of live stock so destined, with instructions given by the shipper, and it follows, therefore, that the cases referred to by the trial court in its opinion, and kindred cases, can not have any bearing upon the question presented by this record.

We respectfully submit, therefore, that considering the exact nature of the relief prayed for by the complainant in its

appeal, and that this relief did not include any through routing or contract between the Louisville & Nashville Railroad Company and the Southern Railway Company for joint traffic arrangements, a large portion of the opinion of the Court of Appeals was uncalled for, and devoted to a question not properly at issue in this case.

IV.

Under the common law, the Interstate Commerce Act and the Constitution and statutes of the State of Kentucky, the appellee is required, as a common carrier, to receive, transport, and deliver freight of all kinds and cars of freight tendered by shippers and consignors at any point on its line, and to deliver the same to the Southern Railway Company at its points of connection with the line of the appellee company, in every case where the consignor specifically orders that freight or cars of freight shall be so delivered to said the Southern Railway Company, and the appellee is required to carry, in accordance with such specific instructions, without discrimination and for reasonable charges.

Section 3 of the Act to Regulate Commerce, Vol. 1, Second Edition U. S. Supplement, page 529, reads as follows:

> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable

proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 213 of the Constitution of Kentucky reads as follows:

"Sec. 213. *Freight and cars to be handled and transported without discrimination.* All railroad, transfer, belt lines, and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines, or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

We concede that at common law a common carrier was only required to carry freight tendered to it to the end of its lines, but we maintain, and shall undertake from the authorities to show, that at common law, and independent of the Interstate Commerce Act, common carriers were bound to serve any and all alike, and to carry any and all freight tendered them within the line of their duties, and upon payment of usual customary charges to deliver such goods to a connecting

carrier where the consignment was destined to a point beyond the lines of the initial carrier. And, further, that at common law it was and is the duty of a common carrier not only to deliver the goods to a connecting carrier, when destined to a point on the line of such connecting carrier, but that its duty at common law was not fully performed until the initial carrier transmitted with the delivery to the connecting carrier whatever instructions that may have been given to it as to the ultimate destination of the said consignment.

When the consignment is delivered to a connecting carrier with instructions as to its ultimate destination the liability of the initial carrier is ended, and it is a matter solely between the connecting carrier and consignor for further carriage of the goods by such connecting carrier, and the compensation to be paid to such connecting carrier.

This common law duty of a common carrier is well expressed by Mr. Elliott in his work on "Railroads," Vol. 4, Sections 1432 and 1440, as follows:

> "Sec. 1432. As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, *the common law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier*, as the case may be. In such a case the goods are to be delivered by the initial carrier to a *connecting* carrier for further transportation; the former is considered as a forwarding agent rather than a carrier as to such further transportation and is not liable for the default of subsequent carriers. *Its whole duty is not always performed*, however, by merely *tendering the goods to the connecting carrier*. If the latter refuses to receive them, it is generally the duty of the initial carrier to notify the consignor or the consignee without unreasonable delay, and to store or otherwise take care of the goods for a reasonable time while awaiting instructions. . . . *So where instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of such initial carrier to duly transmit them to the connecting carrier.*" (Our italics.)

Citing numerous authorities.

"Sec. 1440. It is, in general, the duty of the initial carrier to *obey* the instructions of the shipper, as to the route, mode of carriage and the like, and it should also *transmit the instructions of the shipper to the connecting carrier.*" (Italics ours.)

Citing North v. Merchants Trans. Co., 146 Mass. 315;
Palmer v. Chicago, etc., R. Co., 56 Conn. 137, 13 At. R. 818;
Little Miami R. Co. v. Washburn, 22 Ohio St. 324.

The leading case in the United States Supreme Court reports, at least that case seemingly considered by the text-writers to be the leading case, is that of Railroad Company v. Manufacturing Co., 16 Wall. 318. That case establishes the rule that a common carrier is only liable to the extent of his own route, and for the safe storage and *delivery* to the next carrier. The court, at pages 324 and 325, among other things says:

"Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route without delivery or any attempt to deliver to the connecting carrier."

Further, at page 326:

"*It is true the company were obliged to carry for all persons, without favor, in the regular course of business.*"

Further, at pages 328 and 329:

"The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. . . . *He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal.*" (Our italics.)

The case of *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 106, is an instructive case on the common law duties of common carriers, and in the course of the court's opinion by Justice Field, among other things, it is said :

> "A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are *received for transportation beyond the termination of its own line there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line*—the next carrier on the route beyond." (Our italics.)

See also Penn. R. R. Co. v. Jones, 155 U. S. 333;
Daner v. N. Y. Central, etc., R. R. Co., 50 Howard Pr. 428;
Little Miami R. R. Co. v. Washburn, 22 Ohio St. 330;
Parker v. V. S. C. B. & Q. R. R. Co. and Penn. Co., 56 Conn. 137;
Bosworth v. Chicago R'y Co., 37 Federal, 72;
R. R. Co. v. Manufacturing Co., 16 Wallace, 318;
Vincent v. C. & A. R. R. Co., 49 Ill. 41-44;
Coe v. L. & N. R. R. Co., 3d Federal, 778;
In re Peterson, 21 Fed. 889, and
North v. Transportation Co., 146 Mass. 315.

In support of the bill of complaint in this case there was read what was admitted to be a form of contract in use by appellee for the transportion of live stock over its lines, which said form of contract is ordinarily called a bill of lading, and therein it will be seen that it is provided, among other things, that—

> "The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guarantees," etc. (See Rec., opposite page 58.)

From the bill of complaint and all the proof in support thereof it will be seen that the gravamen of the said complaint is the refusal of the appellee to indicate on bills of lading issued by it the destination, as Central Stock Yards, Kentucky, or any person thereat, and, refusal to show the routing as via Southern Railway Company at Louisville, Kentucky.

We think, under the authorities hereinbefore cited, it was and is the common law duty of appellee to receive, bill and transport to the end of its line all live stock tendered to it at any of its stations, and where destined to Central Stock Yards, Kentucky, on the line of the Southern Railway Company, to show the destination of such consignment and the routing thereof as desired by the owner and consignor of such live stock.

In the case of *Coe* v. *Louisville & Nashville R. R. Co.*, 3 Fed. 778, it is said:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, *their own private interests*, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights, offered for that purpose, in accordance with the usual course of business. *The delivery, when practicable, must be to the consignee.*"

In the case of *Vincent et al.* v. *C. & A. R. R. Co.*, 49 Ill. 33, it is said, on page 38:

> "The rule of the common law, requiring common carriers by land to deliver to the consignee, has been so far relaxed in regard to railways, from necessity, as, in most cases, to substitute, in place of personal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods. . . .
>
> Page 39: "If then, the common law rule requiring of common carriers an immediate delivery, when practicable,

to the consignees, has been relaxed, in regard to railways, only from necessity, it is difficult to see why the rule should not be applied, in its full force, to transportation of this character. Here the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars over a side track, to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned. . . ."

A much earlier Illinois case on the same point was the case of *Michigan Southern & Indiana Railroad Co.* v. *Day*, 20 Ill. 375; it is said therein, on page 379:

"The undertaking of a common carrier to transport goods to a particular destination, it is said, necessarily includes the duty of delivering them in safety, and his obligation to deliver safely can only be avoided by the act of God or the public enemy. It is not sufficient that the goods be carried safely, but they must, and without any demand upon the carrier, be delivered, and when his responsibility has begun, it continues until there has been a due delivery. Angel on Carriers, Sec. 282.

"So it is held, Sec. 281, if a carrier is instructed by his employer to deliver goods on board of another vessel for a continuance of the transportation, and the goods are lost on board such other vessel, he is not responsible if he has safely placed them on board such other vessel, as, by so doing, his character as common carrier has ceased.

"The doctrine pervades the books, that the instructions of the owner or freighter must be obeyed as to the delivery, and if they do obey them in good faith, they are released from liability.

"In 8 Cow. 223, Ackley and Gray v. Kellogg et al., common carriers, who received goods to transport from New York to Troy, and at the latter place transferred them, pursuant to instructions from the bailor, on board a canal boat bound for the north, and the goods were lost by the upsetting of the boat, were held not to be liable, that their character as common carrier ceased at Troy,

and that having taken proper care that the goods were safely put on board the canal boat, they were not responsible for the loss. So where the master of a vessel is directed to tranship, or deliver on board another vessel, a delivery on board such other vessel is the termination of the duty of a common carrier. Van Santwood v. St. John, 6 Hill, 168.

"The case shows, that the direction of the freighter or owner must be obeyed to the letter, and if obeyed, no responsibility for loss is incurred."

A case that has been much cited and quoted from by all the courts in cases touching upon this question is the case of *Beers* v. *Wabash St. L. & P. R'y Co.*, 34 Fed. 244. In this Judge Gresham says, page 247:

"Although the property of the Wabash Company is in the custody of the court, it is operated by the Receiver as a common carrier. His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He can not discriminate against one road by maintaining a policy of non-intercourse with it."

In the case of *Forsythe* v. *Walker*, 9th Pa. St. 148, it is said by Judge Rogers:

"Warehousemen and forwarding merchants are responsible only for want of good faith and reasonable and ordinary diligence; but one of the first duties of a consignee for transmission is to obey the instructions of the consignor, either express or fairly implied. When they undertake to vary from the instructions, proceeding from whatever motive it may, and a loss is occasioned thereby, they are clearly liable to the owner of the goods."

A case involving the appellee herein was the case of the *Louisville & Nashville R. R. Co.* v. *Odill*, 33 S. W. 611 (Sup. Ct. Tenn.).

In this case the court says, on page 612:

"There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a

deviation from the route agreed upon with the shipper may be made and will be justifiable—as for instance, forwarding perishable freight by rail, when a storm prevents a boat from proceeding upon its voyage; but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him. Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties and the original carrier becomes, in effect, an insurer for the line he selects."

In the case of *Johnson* v. *N. Y. C. R'y Co.*, 33 N. Y. 610, it is said by Judge Porter, on page 612:

"But when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty of a plain breach of duty. When he sends goods in a mode prohibited by the owner, he does it at his own risk, and incurs the liability of an insurer. . . .

"The primary duty of the agent is to observe the instructions of his principal, and when he departs from these, he must be content with the voluntary risk he assumes."

The case of McDonald v. Western R. R. Corporation, 34 N. Y. 497, outlines the liability of successive connecting carriers as indicated in the syllabus. This case decides that:

"Where goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond."

In the case of Hewett v. C. B. & Q. R'y Co., 63 Ia. 611, it is said by Judge Reed, on page 616:

"As we have already seen, its (the defendant's) undertakings were, *first*, to convey the property to Council Bluffs with safety and dispatch, and, *second* to deliver it within a reasonable time to some other carrier at that point, to be transported to its destination."

Perhaps one of the clearest statements ever made of this duty of the defendant to receive shipments destined to consignees on the line of the Southern Railway is conveyed in the case of C., B. & Q. R'y Co. v. B., C. R. & N. R'y Co., 34 Fed. 481. In the very able opinion by Judge Love in that case, it is said (page 483):

> "The United States Interstate Commerce Act provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business. . . .
>
> "The injury complained of is clearly irreparable, except by the remedy now prayed for by the complainant. It is a continuing injury. It may occur every day and many times a day. *This complainant is a common carrier, and can not refuse to receive and carry goods destined to persons living or doing business upon the defendant's lines.* . . .
>
> "The mandatory injunction against the defendant company and its chief officers as prayed will be granted, to continue in force, etc."

We desire also to respectfully call the court's attention to the fact that the application of this rule, that a common carrier is required to deliver to a consignee wherever possible, is just as clear in cases where the consignee is a connecting carrier as it is in the cases where the consignee is an individual upon the line of the original carrier.

This is laid down quite clearly in the case of *Inman* v. *St. L. S. W. R. Co.*, 37 S. W. 37 (Tex.) In the opinion of the court by Judge Williams, on page 41, it is stated:

> "To impose upon the carrier the duty of receiving and carrying to the end of its line, and there delivering to a

> connecting carrier, over whose line the property is destined, requires no contract. The right of the shipper to have his goods delivered to the connecting line is involved in the right to consign them as he chooses. He can not compel the first carrier, at common law, to assume any obligation beyond his own line; but, in our opinion, *he* has as clear a right to compel such carrier to carry to the end of his line and deliver, according to the usual course, to a connecting carrier, with which there is an established method of doing such business, as he has to have delivery made to any consignee whom he may select."

The application of the above principle is clearly indicated also in the opinion of Judge Baxter, reported in the case of *Dinsmore* v. *L. C. & L. R'y Co.*, 2 Flippin, 672 (C. T. Tenn.), where it is said, on page 678:

> "As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons."

We desire at this point to call the court's special attention to the opinion in the case of *McCoy* v. *C. I. St. L. & C. R. Co.*, 13 Fed. 3.

The facts in this case were that the complainant owned a fully equipped stock yards situated on the tracks of the Cin. & Balt. R. R. Co., and adjacent to the stock yards of the United Railroads Stock Yards Company, also situated upon the same tracks, both stock yards being fully equipped with the necessary sidings, etc., for the discharge of live stock. The defendant had the right to use the tracks of the C. & B. R. R. by contract, and entered into a contract with the U. R. S. Y. Co. to deliver all stock consigned to Cincinnati to that Company's yards. Complainant in his bill asked for an injunction restraining the defendant from discriminating against him, and for a mandatory injunction to compel defendant to make deliveries to him on same terms as to his competitor. The opinion of Judge Baxter is a very strong one, well worthy of perusal, and is one

that we would like to quote in full, had we the space. In it, on page 9, the court says:

> "The business of receiving, feeding, dealing in, and forwarding live stock is legitimate and necessary. To do so on a scale commensurate with the trade of Cincinnati in that line necessitates large expenditures in the erection of buildings and equipment of suitable yards; and, being both legitimate and useful, *everybody engaging in it is entitled to equal facilities in the use of railroads*, upon which they are largely dependent for success; for it is obvious if the railroads centering at Cincinnati, or the officials who control them, are permitted to combine and establish a stock yard as a private enterprise, and by contract make it *the* depot of the roads for the receipt and delivery of all the stock brought to or carried through the city, and withhold like accommodations from their competitors, they can suppress competition, and establish and maintain a monopoly in that particular department of trade, and subject the public to the payment of undue and unreasonable exactions for the services rendered. *I am very clear that no such right exists.*" (Our italics.)

The court then grants the injunction as prayed.

We trust that nothing that we have heretofore said in relation to the fact that the duties to be performed by the Southern Railway in this case are what are technically known as "switching movements," and to the effect that the distance to be covered by the Southern Railway Company in transferring cars from the Louisville & Nashville R. R. Co. to the Central Stock Yards, will lead this court to infer that we believe that the Southern Railway Company would be acting in any other capacity than that of a common carrier in making such transfer. The law, as we understand it, is, that the distance over which freight is hauled, whether in car load lots or less, makes no difference with the fact that the company is acting as a common carrier. The point is hardly worthy of digression, but as outlining the law in this regard, we desire to quote from the case of *Missouri Pacific Railway Co.* v. *Wichita Wholesale*

Grocery Company, 40 Pacific, 899 (Sup. Ct. Kas. 1895), where it is said by Judge Allen, on page 900:

> "The distance over which freight is hauled, whether in car load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train."

Some question was sought to be raised by counsel for appellees in the courts below as to the right of appellant, conceding that it had the right to compel appellee to receive live stock destined to the Central Stock Yards and transfer same to the Southern Railway Company, to compel it to make such transfer without breaking bulk.

Where live stock and perishable freight which will suffer damage by delays and by reason of handling, are to be transported over more than one road, the initial carrier, *by reason of the long practice and recognized course of business in handling such freight, and the absolute necessity therefor*, must deliver same without breaking bulk to the connecting carrier, that is, without unloading, and it must permit its cars to be used to the destination of said shipment. This practice and course of business is so absolutely necessary and well established that the courts take judicial notice thereof.

This proposition seems to have been conceded by the Court of Appeals in the opinion rendered herein, and attention is now called to same merely for the purpose of showing that in the case at bar, the Louisville & Nashville Railroad, in delivering to the Southern road as requested, not only would not be required to load or unload said live stock, but in law would not be permitted to do so, but would necessarily turn over the cars in which said live stock was loaded, to the Southern Railway, to be delivered by said road to the Central Stock Yards, and that therefore the facts in the case

at bar places it outside of the rule in the Butchers and Drovers and Keith cases.

The authorities sustaining this proposition are as follows:

Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135;
Louisville & Nashville R. R. Co. v. Williams, 95 Ky. 199;
Jacobson v. Wisconsin, Minnesota & Pacific R. R. Co., 71 Minn. 532; 40 L. R. A. 392; 179 U. S. 287; 70 Amer. State Reports, 364;
Burlington C. R. & N. R. R. Co. v. Dey, 82 Iowa, 312; 12 L. R. A. 436;
Michigan C. R. Co. v. Smithson, 45 Michigan, 212;
Inman v. St. Louis S. W. R. R. Co., 37 S. W. Report. 37.

In the case of Peoria & P. Q. R. R. Co. v. C. R. I. & P. R. Co., 109 Ill. 135 (perhaps the leading case in the State courts on carriers), it was said, on page 139:

> "It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country."

In the Jacobson case cited above, it was said by the court, on page 392:

> "As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of doing business. We are clearly of the opinion that the Legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered. The Supreme Court of Iowa reached the same conclusion in Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584. See also Atchison, T. & S. F. R. Co. v. Denver

& N. O. R. Co., 110 U. S. 667, 28 L. ed. 291; Peoria & P. U. R. Co. v. Chicago R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 615; Michigan C. R. Co. v. Smithson, 45 Mich. 212; State v. Wabash, St. L. & P. R. Co., 83 Mo. 144."

In the case of Burling. Cedar & N. R. Co. v. Dey, *supra*, it is said, on page 443:

"The course of business of railroad companies, originating in the wants and demands of commerce, requires the cars of one company to be delivered to another for transportation. It is presumed that rules relating to compensation for the cars transported are settled by agreement, or under rules recognized and prevailing in the business of transportation by railroads. At all events, the law provides rules under which this matter of compensation may be settled. . . . The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Chicago R. I. & P. R. Co., 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road. Peoria & P. U. R. Co. v. Chicago R. I. & P. Co., *supra*."

The custom and right to thus interchange cars is also laid down in the case of the Wabash R. R. Co. v. Farrell, 79 Ill. 508, where it is said, on page 518:

"On the multiplicity of railroads throughout the country there are cars of many kinds varying much in

size, height, and form of construction, and no railroad company would be justified in refusing to receive the cars of other roads because they were not uniform with its own."

This doctrine was also laid down by the said court in the case of the *Chicago Great Western R'y Co.* v. *Armstrong*, 62 Ill. App. 228, where it is said, on page 234:

> "Railroads are compelled to haul the cars of other roads, provided they appear to be in an ordinarily safe and proper condition. As to their own cars, railroads choose which they will use; as to the cars of other companies, they have no opportunity for selection; because of this, the duty of railways in respect to the cars of other roads is merely that of proper inspection."

It is submitted that a common carrier can not take into consideration in entering into its contract of carriage, *for what purpose the shipment is made*, as, by reason of its privileges granted, it becomes a quasi public institution and must serve all alike who tender it shipments, affording all equal facilities for receiving, forwarding and delivering said shipments to and from its several lines and those connecting therewith, giving no unreasonable preference or advantage to any person, or corporation, or locality. This is no new doctrine, but is a fundamental principle of the common law clearly and forcibly stated by Judge Baxter in the case.

The third section of the Interstate Commerce Act is equally as broad upon this proposition as the common law doctrine just stated.

Admitting that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company and established as a general stock depot for receiving and delivery of stock at Louisville, Kentucky, as is held by the Court of Appeals, in view of the plain letter of the law it is difficult to see how this state of affairs can have any controlling or even persuasive influence in determining the legal propositions submitted.

It seems to be settled beyond controversy, that a common carrier must serve the public equally. It is certainly as well settled that where it holds itself out as a common carrier of live stock, it must accept such shipments tendered and make carriage thereof in the usual and customary way, that is, without breaking bulk, and in accepting such shipments, where the destination is not upon the lines of the initial carrier, but in order to reach the consignee it must be delivered by the initial carrier to a connecting carrier for delivery, the duty of the initial carrier is not discharged until he has made such delivery together with the instructions as to the destination, for if it were otherwise then certainly the general business of the country would greatly suffer, as in most shipments the consignor is unable to follow in person said shipment.

It is thought to be well settled that the right of the initial carrier to deliver at its established stock depot is dependent solely upon the question as to whether or not, under the contract of shipment, a *loading or unloading* of said stock is made necessary on the lines of said initial carrier at said point. It is certainly the only condition upon which *this right of delivery at said depot arises*, that is, the responsibility and trouble of unloading and loading. How, then, can the fact that this live stock is delivered for the the *Louisville market* make any change in the principle of the law under the state of facts existing in this case, which requires that the initial carrier shall deliver to the connecting carrier for delivery? There seems but one answer to this question, viewing it from the standpoint of defendant, as its defense is presented both by its answer and affidavits, that is, that it *will not deliver to the Central Stock Yards because, in doing so, it is thereby strengthening and building up an adversary of its own live stock depot.*

If the delivery of the shipment is to be made by a connecting carrier at a market other than that of Louisville, it is not thought that it would be contended that the Louisville

& Nashville Railroad *could not* be compelled to receive and make said delivery to the connecting carrier. What principle then of right or equity is there that changes the rule because the delivery is to be made to a connecting line for delivery to the consignee for the SAME MARKET whereon the common carrier has employed *a like enterprise?*

It is evident that the Court of Appeals concluded that as the Central Stock Yards was a *Louisville market*, the destination of shipments thereto was reached upon the arrival of the Louisville & Nashville trains at LOUISVILLE, and that, therefore, a DELIVERY was to be made by the LOUISVILLE & NASHVILLE, thus giving it the right to unload AT ITS STOCK YARDS and make such delivery therefrom. In view of the requirements of both the common law and the Interstate Commerce Act, it is respectfully submitted that this conclusion is erroneous, because the physical connection not only EXISTS BETWEEN THE TRACKS OF THE TWO ROADS, but is in constant use for all shipments, except those of live stock destined to the Central Stock Yards, and the only reason for this exception is shown by the answer of defendant and affidavits filed therewith; that is, that it and the Bourbon Stock Yards have expended considerable money in erecting and equipping said yards, and that it is entitled to deliver all stock hauled over its road at said yards, and to require it to deliver to the Southern would also put it to considerable inconvenience and require an additional engine and crew.

Stated briefly, the substance of defendant's defense herein is that to require it to deliver to the Southern would work an injury to its stock yards and prevent it from COMPELLING SHIPPERS to patronize same regardless of their wishes in the matter and prevent it from building up a monopoly at the Bourbon Yards, and would also compel it to furnish the public such service as is due from it by reason of the privileges granted.

If this is the law, then it necessarily results that whenever any railroad entering a given city establishes its stock

yards, if it happens that its lines pass through the stock-growing section of the country, as in the case of the Louisville & Nashville Railroad, then said road *can make a monopoly of the stock yard business*, although it may have a physical connection between its tracks and those of other roads in said city, upon which other roads there are also established stock yards; because, as shown in this case, and as is also a fact so well known that the court may take judicial notice of it, that to require the stock to be delivered at the Bourbon Stock Yards and there unloaded, and then reloaded and shipped to the Central Stock Yards, or driven on foot through the populous part of the city, a distance of some six miles, would cause such a loss to said stock in shrinkage and waste, damage and expense, as to make it entirely unprofitable to the shippers. This certainly ought not to be the law regarding the question, simply from a point of common honesty and fair dealing. The wishes of a shipper, where the facilities exist for carriage, certainly ought to be consulted. *He may have many good and valid reasons for desiring to patronize one yard instead of another, and the common carrier is granted its existence and privileges upon the idea that it will, according to its powers, furnish equal facilities for the receiving and forwarding and delivery of the property of said shippers to and from its several lines and those connecting therewith, and it has no right whatever to inquire before receiving said shipments* AS TO THE USES TO BE MADE THEREOF WHEN THE SAME REACHES ITS DESTINATION. *To grant it such power would place it above the interests of the people, that it is created for and required to serve*, and it certainly will not be contended that such reasonable and just requirements as are herein asked, although they may put said road to some inconvenience and require it to furnish additional rolling stock and service to handle the increase of business, will constitute any legal excuse.

The ANSWER in this case does not present any defense based on the idea of freights, but rests the entire case upon the two questions:

1. That having, at great expense, established its own stock yards, it has a right in law to deliver all freights coming over its lines at said stock yards.

2. That to require it to deliver to the Southern would disarrange its manner of transacting business, and put it to considerable trouble and expense in having to furnish an additional engine and crew.

This certainly presents a fair statement of the defense tendered, and it is submitted that it is shown by the bill that what may be termed the *technical* objections to the enforcement of the right to have this stock received and delivered have been fully met, bringing the case down upon its merits to the two propositions of defense stated.

If it be true that plaintiff is entitled, as a matter of law, to have these shipments delivered to the connecting carrier, then the violation of that right is so far-reaching and so detrimental to the interests of the Central Stock Yards, with its investment of some two hundred thousand dollars, and of such great importance to the public generally, that no court ought to permit technical questions to stand in the way of the enforcement of said right, unless compelled to do so by some imperative requirements of the law.

As to the second defense relied on by defendant, that is, that to require it to deliver to the Southern Railway would disarrange its manner of transacting business, and put it to trouble and expense in having to furnish an additional engine and crew, it is not thought that it will be seriously insisted that this defense is valid or constitutes any legal excuse whatever for the non-performance of a plain duty. The defendant is engaged in a public service, and has placed its property in such a position that the public has an interest in its use. It has assumed said relation, and agreed volun-

tarily to accept all the conditions of said service which attach. It does not perform said service with a single idea of profit, and it must comply with all requirements, although they may result in inconvenience, expense, etc.

Wisconsin M & P. R. Co. v. Jacobson, 179 U. S. 287;
Worcester v. Norwich & W. R. Co., 109 Mass. 112;
People *ex rel.* Green v. Duchess & C. R. Co., 58 N. Y. 152;
People *ex rel.* Kimble v. Boston & A. R. Co., 70 N. Y. 569;
People *ex rel.* v. N. Y., L. E. & A. R. Co., 104 N. Y. 58;
48th American Reports, 484;
9th N. E. 856;
Cotting v. Goddard, 183 U. S. 79;

The opinion of the Court of Appeals as understood is based largely upon the cases of

Stock Yards Co. v. Keith, 139 U. S. 228-36;
Butchers & Drovers Stock Yards Co. v. Louisville & Nashville Railroad Company, 67 Fed. Rep. 35;
Penn. R. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727.

While the doctrine enunciated in these decisions is not questioned, it is respectfully submitted that under the facts in the case at bar said doctrine is not applicable.

It is earnestly insisted that these cases go no further than to determine that owing to the nature of these live stock shipments, facilities, other than those for dead freight, must be provided by the common carrier where such live freight is required *to be loaded or unloaded on its lines.* Such facilities may be furnished by others than the common carrier, and, if adequate, they will meet the requirements of the law; and such carrier can not be required, in any city, to furnish more than one depot where stock is to be loaded or unloaded; and the above cases, at first sight, seem to decide that it may, as a matter of right, deliver all such live freight coming over its lines at such depot *provided the destination of said shipment terminates on the lines of said common carrier at said city.*

A careful examination of the facts in these cases shows this distinction, however: In the Keith case, Keith was (p. 129) "engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the City of Covington, Ky., over the Kentucky Central Railroad." Also he was "the proprietor of certain live stock lots and yards in that city," and "was provided with all the necessary means of receiving, feeding, and caring for such stock *as he purchased or as might be consigned to him by others for sale.*" In other words, he had his own *private* yard and was in an entirely different position from the appellant in this case and the original complainants in the cases of *Coe* v. *L. & N. R. R. Co.*, 3 Fed. 778, and *Interstate S. Y. Co.* v. *Ind. U. R'y Co.*, 99 Fed. 472, all of whom maintained *public yards*, and stood in the position of *public warehousemen* ready to care for all who come. Appellant herein does not *buy and sell* stock; it *yards and cares* for it. The right of the railroad company to compel a *private individual* to accept a delivery of live stock at the yards maintained by it is certainly very different from its alleged right to build up a monopoly of the *public stock yards business.*

The Butchers and Drovers case simply decides that the carrier can not be compelled to build a spur track connecting a stock yards with its road where the grade of such track, if built, would render it useless for the purposes of the delivery of live stock. This can have no application to the case at bar, and does not conflict with *Coe* and *Interstate* cases, *supra*, which we discuss under VII of this brief.

It is thoroughly understood that carriers of live stock are required to furnish facilities for unloading such stock for the purpose of feeding and watering, as required by law, but that question does not arise, and is not involved in any way whatever in the case at bar, and is therefore not considered in the statement of the propositions of law.

It is respectfully submitted that the case of Penn. R. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727, has but

slight bearing upon the case at bar. It simply states a general proposition of law as to the care in handling live stock. The Butchers & Drovers case, 67 Federal Reporter, and the Keith case, 139 U. S., do not touch upon the propositions presented by the case at bar, that is, where the initial carrier is simply sought to be compelled to receive for shipment over its lines and to deliver to a connecting carrier for delivery by said connecting carrier.

In the case at bar, appellant simply asks that the Louisville & Nashville Railroad Company be compelled to receive when tendered any live stock, and to bill, transport, switch, and deliver the same, as ordered by its consignor, to the Southern Railway Company at any point of physical connection between the tracks of said Louisville & Nashville Railroad Company and the tracks of the Southern Railway Company in Kentucky, at Louisville, Ky., for delivery by the Southern Railway Company to the Central Stock Yards, etc., and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock. In the bill it is alleged, and not denied by the answer, that the said two railway systems have heretofore received and delivered, and are now receiving and delivering, each one to the other and from the other, freight (other than live stock consigned to the Central Stock Yards) in car lots and less for delivery to consignees on the track or tracks of the one or the other. By the affidavit of S. A. Stalcup (Record, pages 23 to 24) this allegation is sustained, and while defendant fails to deny same in its answer, in the affidavits of Mr. Hines (pages 12 and 51 of the Record) he in substance admits this allegation, but says that said shipments were only made as to live stock going to and coming from *non-competitive points*, but as to dead freight he makes no exception whatever.

Our conclusion, from all the cases, thus comes down to this:

We believe it to be the rule, both at common law and under the Interstate Commerce Act and the statutes of and the Constitution of Kentucky, that the Louisville & Nashville Railroad Company is compelled to accept all stock tendered to it by shippers upon its lines, to be delivered by it to the Southern Railway Company at any point of connection, and that, having accepted such live stock, it must show its final destination as the Central Stock Yards upon the bill of lading, and must turn over the same to the Southern Railway at the point of connection in the cars in which it is shipped, *together with instructions to said Southern Railway as to its destination*, which last point we shall now take up.

V.

The duty of the appellee as a common carrier is not discharged until it delivers the freight or car of freight to the point of specified connection and furnishes to the agent of such known specified connection the instructions of the consignor or shipper as to the further carriage or delivery of the freight or car of freight.

The above principle is so well understood, and has been so often clearly and concisely laid down in the opinions of our courts, that we do not feel it needs the attention which we have given to Proposition IV, just preceding. We desire, however, to call the attention of the court to a few of the leading cases in which the ruling is laid down most concisely.

At common law, a common carrier was only required to carry freight tendered it to the end of its lines, but independent of the Interstate Commerce Act, common carriers

were bound to serve any and all alike, and to carry any and all freight tendered to them within the line of their duties, and upon the payment of their usual and customary charges, to deliver such goods to a connecting carrier where the consignment was *destined to a point beyond the lines* of the initial carrier. And further, at common law, it was and is the duty of a common carrier not only to deliver the goods to a connecting common carrier when destined to a point on the line of such connecting carrier, but its duty at common law was not fully performed until the initial carrier transmitted with the delivery to the connecting carrier *whatever instructions that may have been given to it as to the ultimate destination of the said consignment.*

When the consignment is delivered to a connecting carrier with instructions as to its ultimate destination, the liability of the initial carrier is ended, and it is a matter solely between the connecting carrier and the consignor for further carriage of the goods by such connecting carrier, and the compensation to be paid to such connecting carrier.

In the opinion rendered herein in the Court of Appeals, it is held that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company, and is a Louisville stock yard to be used in building up the live stock business to and from Louisville, and it is said by the court that these facts narrow the case to the consideration of the rights of complainant to require the Louisville & Nashville Railroad Company to make transfer to the Central Stock Yards Company over the connection of the Southern Railway of live stock whose destination is Louisville.

At common law, while a common carrier can not be compelled to carry beyond its lines or to make traffic arrangements with other roads for through billing, thus extending its lines by assuming responsibility for safe

delivery, yet at common law such carrier is in the exercise of a public duty or office, and as such is bound to carry safely whatever goods are entrusted to it for transportation within the course of its business to the end of its route, and if the destination of said shipment is off of or beyond the termination of its own line, there is super-added to its duty that of a forwarder by the connecting line, and when instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of said initial carrier to duly transmit these instructions, and its responsibility is not discharged as a common carrier until it has so delivered said goods, *together with the instructions*. And as it is shown that the Louisville & Nashville Railroad Company is a common carrier engaged in the transportation of live stock, and that it has a physical connection between its tracks and that of the Southern Railway in Kentucky, at Louisville, Kentucky, and as by reason of the long practice and course of business rendered absolutely necessary in the shipment of live stock delivery thereof in bulk is required, that is, without unloading, said road in assuming the duties of a common carrier of live stock, undertakes and agrees with the public, *and is required by law*, to accept such shipments, to be handled *according to the usual custc .. and necessity of the case*, and where the destination is on the lines of a connecting carrier, to deliver it to said connecting carrier in bulk, that is, in its cars, as that is the usual and in fact the only way live stock is or can be handled.

If understood correctly, the Court of Appeals holds that said Central Stock Yards is a Louisville market, and *that the destination of the shipments made to it is the city of Louisville, Kentucky*, and as the Louisville & Nashville Railroad Company can not be compelled to have more than one depot of delivery in said city, it has the right to deliver said shipments made to the Central Stock Yards

at its depot of delivery, which is the Bourbon Stock Yards, in said city.

It is respectfully submitted that this conclusion is incorrect, because the right of delivery of live stock by a common carrier at its depot established for that purpose, is dependent *solely* upon the fact *as to whether or not said initial carrier is required to load or unload said stock;* and as said requirements and necessity for said depot only exist under that state of case, and as in the shipments to the Central Stock Yards the Louisville & Nashville Railroad Company is not only *not required to unload*, but under law can not refuse to permit same to be shipped to the Central Stock Yards in bulk, in its cars, delivery at its said live stock depot is not only unnecessary, but is in violation of appellant's rights.

For the purpose of argument, let us suppose that these shipments to the Central Stock Yards consisted of dead freight. Will it be contended that the Louisville & Nashville Railroad Company would not, under law, be compelled to receive said shipments, and on their bill of lading show the destination, *Central Stock Yards?* The live stock shipments only differ from the dead freight shipments as to the responsibility and trouble of loading and unloading, and if it be conceded, as the authorities seem to hold without conflict, that these live stock shipments are to be made without breaking bulk, that is, without change of cars, then this does away with said distinction between *dead* and *live* freight, because by reason of the nature of the live stock shipments the right to *unload*, on the part of the initial carrier, is denied.

It certainly can not be contended that it is any part of the duty of a common carrier to furnish to shippers of live stock any market therefor. The Louisville & Nashville Railroad Company has undertaken to provide for itself in

Louisville, Kentucky, not only a live-stock depot or loading and unloading chutes and pens, but a live-stock market for its patrons, and insists that shippers shall only patronize the market so provided by it. Can this be lawful and enforceable as against the wishes of the owners of live stock? We think not.

The case of *Bosworth v. Chicago, etc., R'y Co.*, 87 Fed. 72, is a recent and exceedingly well considered case, and in the course of the opinion of the court therein, Judge Woods, among other things, said, at page 81:

> "In respect to that car, no interruption in the course of transit having been contemplated or authorized either by the shippers or by the consignees, it may be said that the receiver, as one of the connecting carriers, was under the double duty—it would perhaps be proper to say as agent for the shipper—to *deliver possession and to communicate shipping directions to the next carrier; and that duty, in one aspect, not having been performed, his liability as carrier had not ceased.*" (Our italics.)

In the same case, in a separate opinion by Judge Jenkins, it is said, at page 81:

> "The owner or shipper of goods to be carried over connecting lines of railway is entitled to the protection afforded by the common law liability of a carrier until the goods have arrived at their destination, and a reasonable time has elapsed after their arrival to accept delivery of them; and, with respect to connecting lines, each carrier assumes the responsibility of an insurer while the goods are in transit over its particular line, and until delivery to the next succeeding carrier. R. R. Co. v. Manfg. Co., 16 Wallace, 318; Railroad Co. v. Jones, 155 U. S. 333."

The cases of Vincent v. C. & A. R. R. Co., 49 Ill. 41 to 44, and Coe v. L. & N. R. R. Co., 3 Fed. 778, with clearness state the common law duty of a common carrier, and

show that it is the duty of appellee to make delivery of live stock to the Southern Railway Company at one of the points of physical connection between its tracks and those of the Southern Railway Company in Louisville, Kentucky, for delivery by the latter company at Central Stock Yards, Kentucky, because such a delivery is practicable, can be more quickly made with less expense to appellee, and less time consumed in making delivery and return of cars than is required for delivery to be made at the Bourbon Stock Yards by appellee.

In the case of *Selma & Meridian R. R. Co. v. Butts*, 43 Ala. 385, it was said by Judge Peters, page 389:

> "And if the railroad company first receiving the goods for transportation, takes charge of them, to be carried over its own road to the end of its line, or to some specified point on such line, to be thence forwarded to a person beyond its own means of transportation, and such goods are directed to a particular consignee, at the place where the goods are first to be delivered and transshipped, it is the duty of such railroad company to deliver the goods to such consignee with notice of the instructions of the consignor or owner, to have them forwarded to the place of their ultimate destination."

One of the clearest decisions on this point is found in the case of *Little Miami R. R. Co. v. Washburn*, 22 Ohio St. 324, a leading case on this point. In that case Judge West said, at page 330:

> "A common carrier who receives goods under an agreement to transport them over the whole or any part of his own route, and then to forward them to a destination beyond, acts in the twofold capacity of carrier and forwarder. In the latter capacity, alleged negligence in which is the single ground of controversy presented by this record, he acts as agent of the consignor, and as such, is bound to transmit with reasonable exactness, to the next succeeding carrier, the instructions of his principal. If these instructions be without restric-

tion as to the subsequent route, intermediate consignment, or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions, in terms sufficiently explicit and unambiguous to inform him of their ultimate destination. Briggs v. Boston & Lowell R. R. Co., 6 Allen, 249.

"But if the instructions of the consignee [consignor ?] be special and restrictive the carrier will not have performed his duty as forwarding agent, if he shall have neglected or omitted to transmit, with the delivery of the goods to the next carrier, any material or substantive part of such special instructions."

In the case of *Colefax Mountain & Fruit Co.* v. S. P. Co., 46 Pac. 66, it was held that where a shipper delivers goods upon written contract with a railroad company to deliver the same to the next connecting carrier, said goods to go by "passenger service through," the original company will be liable for any delay if such delay results from its neglect to give instructions to the connecting lines conveying the freight to its destination.

In the case of *Dana v. N. Y. C. & H. R. R. Co.*, 50 How. Pr. 428, Judge Hardin said (page 429):

"The receipt declared that the company, in sending forward goods beyond the defendant's termini, shall act 'as the agent of the consignor or consignee, and not as carrier.'

"As such agent, it was its duty to give correct information and instructions as to the delivery of the property. If it gave others, it acted at its own risk and peril. (Johnson, Agt., v. N. Y. C. R. Co., 33 N. Y. 610; Goodrich, Agt., v. Thompson, 44 Ill. 324.)"

The cases of

McDonald v. Western R. Co., 34 N. Y. 497;
Hewett v. R. Co., 63 Iowa, 611;
R. R. Co. v. Mfg. Co., 16 Wallace, 318,

from which we have already quoted at length, all sustain this proposition; we, therefore, deem it unquestioned that a carrier who has assumed the duties of a forwarder must, at the time of delivery to the connecting carrier, transmit all instructions as to future routes and destinations.

VI.

The provisions of the Kentucky Constitution and statutes not being in conflict with the Interstate Commerce Act are in the nature of reasonable regulations in aid thereof and will be enforced by the Federal courts.

The question of requiring that a railroad company, by transfer of cars, interchange traffic in car load lots, make delivery to the point of destination, as directed by the consignor, and to a point beyond the termini of the original road under the authorities, is unquestionably subject to the power of regulation by act of Congress, and to regulation by State constitutional provisions and legislative enactments, the limitation of the State in its regulation being to the extent that it can not affect interstate commerce to an unreasonable extent, but may, incidentally, affect interstate commerce in the matter of local regulations.

The test determining whether the constitutional and statutory provisions of the State of Kentucky conflict with the legislation of Congress in the acts to regulate commerce must be by ascertainment of whether or not the said constitutional and statutory provisions are discriminating, and more particularly as to whether or not they tend to produce a conflict of regulations.

Under the police power the State Government may regulate the conduct of its citizens (and in such classification a corporation is a citizen) one towards another, and the

manner in which each shall use his property when necessary to the public good, and the regulation of common carriers, is incident to the existence of such power.

Munn v. Ill., 94 U. S. 125.

When the owner of property, as common carrier, devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he had thus created.

See Sanford v. Railroad Co., 24 Pa. St. 378;

Munn v. Illinois, 94 U. S. 126 to 130.

The State of Kentucky, under its police power, enacted Sections 213 to 217 of its Constitution and general statutory regulations as per Sections 818 and 819 of its general laws and regulations for the conduct of the business of common carriers, and the method of the transaction of business by one common carrier with another where there is a point of physical connection between the tracks of any two common carriers, and with the most careful study we fail to find any conflict between the constitutional and statutory provisions of the State of Kentucky with the provisions of the Act to Regulate Commerce, and are convinced that it was the duty of the trial court, where an interchange of traffic is commanded, as has been by the Act of Congress and statutory and constitutional provisions of the State in aid of such commerce, to have compelled compliance with such requirements by mandatory injunction.

The question, therefore, presented for determination under this phase of the case, is whether or not the appellee, Louisville & Nashville Railroad Company, shall be compelled to comply with the mandatory provisions of Section 3 of the Interstate Commerce Act and with the mandatory provisions of Sections 213 and 214 of the Constitution of Kentucky, or comply with its un-

authorized, illegal, and discriminating contract made with the Bourbon Stock Yards Company?

We submit that in all fairness there can be but one answer to such a question. Independent of the act of Congress and constitutional and statutory provisions referred to, we maintain that public policy forbids that common carriers shall be permitted to favor one shipper or one consignee, or one class of shippers or any class of shippers in making delivery to a particular class or a single consignee, and that a common carrier can not so disregard its general duty to the public to treat all alike, and to accept and carry goods without discrimination or prejudice either as to the persons to be served or to the points for delivery thereof.

Section 213 of the State Constitution of Kentucky only requires of common carriers doing business in Kentucky service of that character known as switching, and only from a point within Kentucky to some other point within Kentucky and the place of destination of freight, and such a switching regulation is not such an interference with interstate traffic as to make the regulations invalid, and it follows that compliance with said Section 213 of the Constitution may be exacted in the delivery of freight, although same may have originated in some other State than Kentucky.

The cases of Chicago, etc. R'y Co. v. Becker, 32 Fed. 849, and State of Iowa v. Chicago, etc., R'y Co., 33 Fed. 391, are the only Federal adjudications on this subject that we have been able to find, and they are conclusive of our contention in this regard.

As incidental to the operation of a railroad, it has the power to interchange cars with a connecting carrier, and such is the ordinary and usual way of doing business between common carriers, and the overwhelming weight of

authority, if not without contra authority, is that common carriers may by constitutional requirement or legislative enactment be compelled to interchange cars, the one with the other, for delivery on the line of the one or the other to a named consignee. See

Jacobson v. Wisconsin, Minnesota & Pacific R. R. Company, 71 Minn. 532; same case, 40 L. R. A. 392 and 179 U. S. 297, 70 Am. St. Rep. 364; also
Burlington, C. R. &. N. R. R. Co. v. Dey, 82 Iowa, 312, and particularly pages 334, 335, and 336, 12 L. R. A. 436;
Peoria & P. Q. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 135, and particularly pages 139 and 140;
Michigan C. R. Co. v. Smithson, 45 Mich. 212, and particularly pages 221 and 222;
The case of Inmann v. St. Louis S. W. R. Co., 37 S. W. Rep. 37, extensively reviews the authorities and is directly in point.

In the Jacobson case, *supra*, the Supreme Court of Minnesota, in passing upon the constitutionality of a legislative enactment requiring substantially what Section 213 of our Constitution requires, concludes its decision in the following language:

> "We are clearly of the opinion that the legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered." Citing numerous authorities. See full opinion for elaborate consideration of the question.

In the Court of Appeals of Kentucky, in the case of Louisville & Nashville Railroad Company v. Williams, 95 Ky. 199, the appellee in this case relied upon Section 213 of the State Constitution herein in exemption from liability in taking a car from a connecting carrier, as it had been com-

pelled by the said enactment to take the said car. At page 202 of the opinion, the court said:

> "It seems to us the constitutional provisions by which one railroad company is compelled (thereby admitting the contention of the L. & N. therein) to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe to those who are required to handle them, it is the duty of the company to refuse to receive the car, if such defects exists, *and no other construction, it seems to us, can well be given this clause of the Constitution.*" (Our italics.)

It thus affirmatively appears that the Court of Appeals of Kentucky has construed Section 213 of its Constitution to the effect that if a car offered to a connecting carrier is not unsafe it is, by the said constitutional provision, required to accept the same.

The Supreme Court of Michigan, in the Smithson case, *supra*, 45 Mich., at page 222, in considering a legislative enactment similar to the provision of Section 213 of our Constitution, among other things, said (Cooley, Judge, delivers the opinion):

> "The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual."

In the case of Inmann v. St. L. S. W. R. Co. (Texas Civil Court of Appeals), 37 S. W. Rep., pages 37 to 45, an elaborate review of the authorities will be found, and the constitutionality of a legislative enactment similar to the constitutional provision as contained in Section 213 of our Constitution is upheld.

In the Iowa case, *supra*, Vol. 82, page 336, the Supreme Court of that State, in determining the constitutionality of a statute similar to the constitutional requirements of Section 213 of the Constitution of Kentucky, among other things said:

> "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligations to haul cars of other companies brought to it for transportation over its own road. (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135.) As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed can not be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies."

The principles enunciated and established by the cases of

Western Union Telegraph Co. v. James, 162 U. S. 650;
Wisconsin, Etc., R'y Co. v. Jacobson, 179 U. S. 287;
Lake Shore & Mich. Southern R'y Co. v. Ohio, 173 U. S. 285, and Smith v. Alabama, 124 U. S. 465,

are conclusive of the validity and enforcibility of the constitutional provisions and legislative enactments of the State

of Kentucky by the Federal court on general principles of equitable jurisdiction.

The James case, *supra*, involved the validity of a statute of Georgia, requiring every telegraph company with a line of its wires wholly or partly within that State to receive dispatches and on payment of the usual charges to transmit and deliver them with due diligence to persons within one mile of the telegraph station, or within the city or town of the receiving station. The test laid down in that case of the constitutionality and enforcibility of State regulations is whether or not they can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States. (See opinion, page 660.)

The court, in the course of its opinion by Justice Peckham, at page 656, said:

> "It has been held that it is not every enactment which may incidentally affect commerce and the persons engaged in it that necessarily constitute a regulation of commerce within the meaning of the Constitution. Sherlock v. Alling, 93 U. S. 99; State Tax on Railway Gross Receipts, 15 Wall. 284; Mobile County v. Kimball, 102 U. S. 691; Smith v. Alabama, 124 U. S. 465. A State statute was held valid in this last-cited case, which provided for an examination of engineers of locomotives by a State Board of Examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip from Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation.
>
> "Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect commerce itself. Mobile County v. Kimball, 102 U. S., already cited."

The constitutional and legislative enactments of the State of Kentucky were not designed to, do not purport to, and can not affect the conduct of or regulate the per-

formance of the duties of appellee outside and beyond the limits of Kentucky. The said State regulations are of a nature that are in aid of commerce, and require the performance of a duty on the part of the appellee that it was and is bound to perform, independent of and in the absence of said State regulations or the Act of Congress to regulate commerce.

Justice Peckham, in his opinion in the James case, at page 662, further said:

> "While it is vitally important that commerce between the States should be unembarrassed by vexatious State regulations regarding it, yet on the other hand there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce."

The communication or intercourse by telegraph messages between persons residing or located in different States is undoubtedly interstate commerce under all of the adjudged cases. If there is no unconstitutional interference with interstate commerce if a State statute regulates the transmission and delivery of telegrams, how can it be said to be an unconstitutional interference with interstate commerce for Kentucky to regulate and facilitate the interchange and quick delivery of freight in bulk, when confessedly that freight (live stock) can not be transferred from one car to another without serious damage thereto?

See also Western Union Telegraph Co. v. Howell, 95 Ga. 194, and
Western Union Telegraph Co. v. Bright, 90 Va. 778.

The case of Bagg v. Railroad, 109 N. C. 279, is an exceedingly well-considered case, and therein, among other things, it is said:

"So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all."

Morgan S. S. Co. v. Louisiana, 118 U. S. 455;
Train v. Boston Disinfecting Co., 144 Mass. 523;
Smith v. Alabama, 124 U. S. 465;
Railroad v. Alabama, 128 U. S. 96;
Wilton v. Missouri, 91 U. S. 275;
Railroad v. Fuller, 17 Wall. 560.

If the court will bear in mind that under the proof heard on the motion for an injunction, and by the undenied allegations of the bill and amended bill of complaint, that it is conceded that from the break-up yards of appellee to Central Stock Yards, Kentucky, via Southern Railway Company in Kentucky and the Seventh and Magnolia Street connections of said railway systems in Louisville, Kentucky, the distance is only about one half of that from said break-up yards of appellee to the Bourbon Stock Yards, and that deliveries can be more quickly made of live stock destined to the Central Yards and reaching Louisville over the lines of the appellee than to the Bourbon Yards, it will the more readily be seen that such regulations as have been made by the State of Kentucky are only facilities in aid of commerce and in no wise regulations of such commerce within the meaning of the Federal Constitution.

The quotation from the Jacobson case, in the opinion of the trial court, at page 78 of the Record, that

"At common law the court would be without power to make such an order as was made in this case by the

> State court. Legislative authority would be necessary in order to give power to the court to render a judgment of this kind."

was and is wholly foreign to this case. The order spoken of in the quotation from the opinion was one requiring common carriers to condemn land for the purpose, and to make what confessedly exists in this case, namely, a physical connection of the tracks of one railway system with those of another.

The constitutional and statutory requirements of Ken tucky relied on undertake nothing of the kind, and the prayer in appellant's bill asked for no such relief.

The Supreme Court, in the Jacobson case, speaking through Justice Peckham, at pages 296 and 297, said:

> "If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. (Atchison, etc., Railroad Company v. Denver, etc., Railroad Company, 110 U. S. 667, 681; People, *ex rel.*, etc., v. Boston & Albany Railroad Company, 70 N. Y. 569; People v. Railroad Company, 104 N. Y. 58.)
>
> "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. (Olcott v. Supervisors, 16 Wall. 678, 694; Cherokee Nation v. Southern Kansas Railway Company, 135 U. S. 641; United States v. Joint Traffic Association, 171 *Id.* 505–569, 570; Lake Shore Railway Company v. Ohio, 173 *Id.* 285, 301.)

"It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. (Olcott v. Supervisors, *supra*.) The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience."

Again, at page 301, it is further said:

"We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly or improperly affect the pecuniary rights or interests of the plaintiff in error."

The best-considered case to be found in the adjudged cases is, in our judgment, that of Lake Shore & Michigan Southern Railway Company v. Ohio, 173 U. S. 285 to 309. In that case, Justice Harlan, speaking for the court, enters upon an elaborate review of the authorities as to the extent the States of the Union may legislate with reference to the public convenience of its citizens, and after quoting with approval from the opinion in the James case, and in speaking of the adjudged cases, at page 297, said:

"They recognize the fundamental principle that outside of the field directly occupied by the General Government under the power granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the deter-

mination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State Constitution, are to be respected and enforced in the courts of the Union if they do not, by their operation, directly intrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw,—the power 'to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.' Commonwealth v. Alger, 7 Cushing, 53, 85, Mr. Cooley well said: 'It can not be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' (Cooley's Const. Lim., 6th Ed., page 715.) It may be that such legislation is not within the 'police powers' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

Page 302: "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such

regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character."

It is submitted that Section 3 of the Interstate Commerce Act makes certain requirements of the carrier in general terms, that is, to require it to furnish equal facilities, *without going into detail as to said facilities*, while Section 213 of the Constitution requires no more than is perhaps required by the Interstate Commerce section (that is, as to any proposition involved in this case), but *does enter into detail*, setting forth specifically the acts required in order to furnish said facilities for the interchange of traffic, and forwarding and delivering same between the lines of appellee and those connecting therewith.

That it was intended by the 213th section of the Constitution and legislation had thereon, to require a common carrier to receive, deliver, transport, and transfer freight to any point that is in physical connection with the tracks of the other company there seems to be no doubt, in view of the language used in said section. That the highest court of the State of Kentucky so considered is evident from the language used in the case of the Louisville & Nashville Railroad Company v. Williams, 95 Ky. 199, hereinbefore quoted.

In the opinion rendered by the Circuit Court of Appeals in this case, it is said:

"It is thoroughly settled that the power of Congress to regulate commerce is plenary, and no State

> has the right to regulate purely interstate commerce. On the other hand, the State has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to the County of Mobile v. Kimball, 102 U. S. 691."

Then, after making the quotation from said case, the court holds that the relief sought herein pertains to the transportation and delivery of interstate freight. That it is not the means of making a physical connection with other railroads that is aimed at, but that it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way, and that if the Constitution of Kentucky could be given such construction it would follow that it could regulate interstate commerce.

It is submitted that under the law as it now exists, where Congres has not acted the States may, and that even in cases where Congress has taken action as to the given proposition, that still the State may exercise its POLICE POWER and legislate, PROVIDED SUCH LEGISLATION IS NOT IN CONFLICT WITH THE PROVISIONS OF CONGRESSIONAL ENACTMENTS.

There are numerous authorities to the effect that the police power of a State can not be effectually granted or contracted away or in any wise relinquished, and following along said lines of authorities is the case of Louisville & Nashville R. R. Company v. Commonwealth of Kentucky, 161 U. S. 701; it is said, on page 702:

> "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly

all the railways in the country have been constructed under State authority, and it can not be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

Page 701: "But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, *and add something to the cost of transportation, by the expense incurred in conforming to such regulations.* These are, however, like the taxes imposed upon railways and their rolling stock, which are, more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions, which might, perhaps, lead to an inference that the police power can not be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to commerce itself, it is not true with respect to the *instruments* of such commerce."

It was said, in Sherlock v. Alling, 93 U. S. 99, 103, 104 (23–819–821), and quoted with approbation in Plumley v. Massachusetts, 155 U. S. 462 (39–244), that

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution, . . . *and it may be said, generally, that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens*, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon *citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.*
>
> "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to *the instruments of such commerce*, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it can not be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the *interests of the public may seem to render desirable.* In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; *while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.*" (Our italics.)

The police power of a State, in its broadest acceptation, means the general power to preserve and promote public welfare, even at the expense of private rights, in order to

protect the health, peace, comfort, morals, convenience, and prosperity of the people of the State. This is shown by the Lake Shore, &c., R. R. Co. v. Ohio, 173 U. S. 285, and a number of other authorities.

In considering this question, it is very necessary to bear in mind that the Louisville & Nashville Railroad Company is a Kentucky corporation, created by the Legislature of Kentucky, and subject to control by same. The 213th section of the Constitution of the State of Kentucky as far as the questions involved in this case are concerned, is not in conflict with the provisions of the third section of the Interstate Commerce Act, but is plainly in aid thereof. Said section of the Constitution is not directed against interstate commerce shipments, but, as said in Wisconsin M. & P. R. Co. v. Jacobson, would plainly afford facilities to interstate commerce, and would in no wise regulate such commerce. Besides, it is evident from the bill and affidavits filed in this case, that there was a necessity for such requirement of delivery as to intra-state commerce, and conceding that such necessity exists for intra-state commerce in order to subserve the convenience and prosperity of the citizens of this State, as said in Sherlock v. Alling, 93 U. S. 99, 103–104 (23, 819–921), and reported with approbation in the Jacobson case, legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution, and it may be said generally that the legislation of a State not directed against commerce or any of its regulations but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of an obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.

It is conceded that where Congress has prescribed a regulation as to any given proposition respecting interstate commerce that said enactment is of a plenary nature, and that any State legislation in conflict therewith is void; but if such legislation be simply in aid of the congressional enactment; then it may be enforced, provided it is within the limits of the police power of said State; and it is thought to be the law that as to such police power the State can not effectually grant it away; but, however this may be, it is reasonably certain that if said enactment is not in conflict with the congressional enactment, and is within the limit of the police power, that it is enforceable.

In the case at bar, *while the Circuit Court of Appeals* seems to concede these propositions as stated, it holds that the State requirement of a delivery to a connecting line is a regulation of interstate commerce, as it pertains to the transportation and delivery of interstate freight, and not to the means of making a physical connection with other railroads. While it is true that it does not pertain as in the Jacobson case, to the means of making a physical connection with other roads, as a physical connection already exists, it is a regulation as to the means of delivery of all freight. The necessity therefor, as far as intra-state freight is concerned, is shown to exist, and it certainly has the right to regulate the delivery of such freight. If this incidentally or indirectly also regulates the delivery of interstate freight the destination of which is the city of Louisville, in the State of Kentucky, then it is not thought that this is such a regulation or requirement as to constitute an unreasonable interference with interstate commerce; and as said in Louisville & Nashville Railroad Co. v. The Commonwealth of Kentucky, 161 U. S. 699 (859): "Nearly all of the railways in the country have been constructed under State authority, and it can not be supposed

that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operations as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith, while to the State remains the power *to create* and *to regulate the instruments of such commerce* so far as necessary to the conservation of the public interests." Thus it plainly appears that the power of the State, although Congress has acted, is not exhausted by simply requiring the track to be laid and the connections formed, but it may, in addition thereto, regulate the instruments of such commerce. It would certainly be a useless requirement to make these carriers furnish reasonable facilities for the interchange of traffic between their lines and those of other roads and still not have the power to so regulate such commerce as to require its interchange by the use of such facilities. The purpose of the connection is but half served in laying the tracks. The main object thereof is the interchange of traffic. It is submitted that the court was in error in determining that a requirement to make delivery to a connecting carrier is such a regulation, considering the case presented, as is not enforceable, because, first, the plain construction of the third section of the Interstate Commerce Act requires such delivery. The constitutional provision is simply in aid thereof, and is within the limits of the reserve police powers of the State. It is a reasonable regulation, and does not interfere in any way whatever, by reason of delay of or otherwise, with the delivery of such shipments. While it may result in the control of the manner of delivery of interstate shipments, it does so only indirectly by the

exercise of an authority as to the regulation of the instruments of delivery, and not by direct enactment intended to control interstate freight.

In the case of Richmond & Allegheny R. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311 (759), a contract of shipment was issued for the shipment of interstate freight, its destination being beyond the lines of the initial carrier, and said contract of shipment by express terms released said initial carrier of all responsibility upon delivery to the connecting carrier. Said shipment was made from the State of Virginia to a point in the State of Louisiana. There was at the time a provision in the code of the State of Virginia providing that in the case of such shipments the initial carrier should not be released from responsibility for loss, etc., except by contract in writing signed by the shipper. The case was submitted to the trial court on an agreed statement admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. Plaintiff rested on the statute above quoted, and the defendant on its claim that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States. In said case, which was carried from the Supreme Court of the State of Virginia to the United States Supreme Court, this court held the carrier liable upon the idea that said State enactment, although it affected interstate commerce, was not a regulation thereof, but a rule of evidence made necessary by the State enactment in order to release such liability.

In Chicago, Milwaukee & St. Paul R'y Co. v. Patrick L. Solan, 169 U. S., page 133 (688), it is held that a State statute prohibiting contracts to exempt a railroad company from liability as a common carrier is not in any just sense a regulation of commerce, or void as to interstate business.

If the court will read the debates of the Constitutional Convention of Kentucky (1890) wherein Section 213 was adopted, it will be seen that the convention, in the interest of the general public, recognized the fact that it was no proper business of a common carrier to foster particular enterprises, but that, deriving its franchises from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all of its patrons on an *absolute equality*.

We have always understood the law to be, and the highest court of the State of appellee's creation has held, that public policy forbids that common carriers shall be permitted to favor one shipper or consignee, or one class of shippers or consignees, in discharging the general duty to accept and carry goods without discrimination or prejudice between classes. (See L. & N. R. R. Co. v. Pittsburgh & Kanawha Coal Co., 23 Ky. Law Rep. 1318.)

The Supreme Court of the United States, in Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, in speaking of the rights of the defendant, Louisville & Nashville Railroad Company, under its charter as against the demands of the Constitution of Kentucky, of which Section 213 is a part, said, at pages 517 and 518:

> "As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.
>
> "In Pennsylvania Railroad v. Miller, 132 U. S. 75, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the State and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as

applied to the company in respect to cases afterwards arising, did not impair the obligation of any contract between it and State; and that the company took its charter subject to the general law of the State and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

"The same principle was announced in Louisville Water Co. v. Clark, 143 U. S. 1, and in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677."

Again, at page 518:

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interferance with interstate commerce; that the interferance with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. (New York, Lake Erie & Western Railroad v. Pennsylvania, 158 U. S. 431, 439; Henderson Bridge Co. v. Kentucky, 166 U. S. 150.)

"A discussion of this subject will be found in the opinion of this court in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, 701, where the same conclusion was reached."

It is thought that the case of Minneapolis & St. L. R. Co. v. Minnesota *ex rel.* R. R. & W. Com., decided June 2, 1902, by the Supreme Court of the United States, and found in 186 U. S. 257, and which involved the same act of the legislature that was under consideration in the Jacobson case, 179 U. S., has considerable bearing upon the questions herein raised. This case was brought by writ of error from the Supreme Court of Minnesota (see 80 Minn. 191, 83 N. W. 60), and in the opinion of said State court it is shown that joint

traffic arrangements existed between the several roads. The court held, however, in that case, that independent of such previously existing joint arrangements, no reason existed why under the amendatory act the commission could not lawfully compel a joint arrangement in a case like the one at bar. The court is respectfully referred to this State court opinion, as it seems to have been well considered.

The United States Supreme Court, however, on this point, held that it was not necessary to determine that question in the case, as all that it was required to hold was that where joint tariff between two or more roads had been agreed upon, such traffic is as much within the control of the legislature as if it related only to transportation over a single road. The intimation in said opinion, however, is clear that if it had been necessary to determine said question it would have approved the holding of the State court. (186 U. S. 260.)

In the course of said opinion Justice Brown said:

> "The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the State to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the State to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is im-

possible for the State to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such terms as the former may choose to exact, unless the State shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

. . . "Granting that a State has no right to interfere with the internal economy of a railroad further than to secure the safety and comfort of passengers, as, for example, to fix the wages of employes or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned. . . .

"We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 16 Sup. Ct. Rep. 700), and that, IF THE POWER OF THE STATE COMMISSION WERE LIM-

ITED TO THE TARIFFS OF A SINGLE ROAD, IT WOULD BE WHOLLY INEFFICACIOUS IN A LARGE NUMBER, IF NOT IN A MAJORITY OF CASES—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis & St. Louis Company. It may also be said in this connection, that in Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115, we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, AS WELL AS FOR FACILITIES FOR THE INTERCHANGE OF CARS AND TRAFFIC BETWEEN THEIR RESPECTIVE LINES. The case did not involve the right of the Commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion they are in favor of such right. See also Burlington C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 338, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line."

In this case, in speaking of joint traffic arrangements, it is said that "so far as applies to contracts already in existence, we have no doubt of the power of the State to supervise and regulate them."

As shown in the case at bar, no interference is sought whatever to be had with the freight charges from the point said goods are received to the city of Louisville, and the

charges for the switching movement does not and can not enter into said freight charge, but is a switching charge within the switching limits of the city of Louisville, in the State of Kentucky, that must be paid by the shipper, and with which the initial carrier is not concerned.

As it is thought this case also determines what was intended by said court to be held in the Jacobson case, that is, not only that connection at intersections of roads for transferring cars from the lines or tracks of one company to those of another may be compelled, but THAT FACILITIES FOR THE INTERCHANGE OF CARS AND TRAFFIC BETWEEN THE TWO LINES CAN BE ENFORCED.

This court, in the Jacobson case, reported in 179 U. S. 287, said, on page 295:

> "Plaintiff in error urges that transporting cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the State of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which the judgment is founded. Whether any other portions of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding,and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly *afford facilities to interstate commerce*, if there were any, and *would in no wise regulate such commerce within the meaning of the Constitution*. That is all that has been done by the judgment under review. A State may furnish such

facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution." (Our italics.)

There are not wanting, however, many other decisions, both of this court and the various State courts, to sustain this contention. In the case of *Nashville, Ch. & St. Louis R. Co. v. Alabama*, 128 U. S. 96, it was said, at page 99:

> "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that whenever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but is among their plain duties, to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."

In the earlier case of Chicago & N. W. R. R. Co. v. Fuller, 84 U. S. 560, it was said, at page 568:

> "In the complex system of polity which exists in this country the powers of government may be divided into four classes:
>
> "Those which belong exclusively to the States.
>
> "Those which belong exclusively to the National Government.
>
> "Those which may be exercised concurrently and independently by both.
>
> "And those which may be exercised by the States, but only until Congress shall see fit to act upon the subject.

"The authority of the State then retires and lies in abeyance until the occasion for its exercise shall *recur*. (*Ex parte* McNeil, 13 Wall. 240, 80 U. S. XX, 625.)

"Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. (2 Story, Const., Secs. 1061, 1062.)

"The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To that extent the authority must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

"Others may well vary with the varying circumstances of different localities. Where a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authorities of a State, such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so."

The case of the Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, contains a very clear statement of the powers of the State to prescribe safeguards and precautions in the management of railroads, even though such laws may, in a measure, affect interstate commerce. This court says, on page 137:

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its laws. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled,

while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the laws of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation, those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

There is also another case reported in the same volume, the case of Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, in which the court, at page 626, discusses the proper effect to be given to a Kansas statute as follows:

"Nor is the statute of Kansas to be deemed a regulation of commerce among the States, simply because it may incidentally or indirectly affect such commerce. . . .

"Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct

powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and State governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer. . . .

Page 628: "This court, while sustaining the power of Congress to regulate commerce among the States has steadily adhered to the principle that the States possess, because they have never surrendered, the power to protect the pubilc health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, or come in conflict with acts of Congress passed in pursuance of that instrument."

The court, in considering this case, should not lose sight of the fact that appellee is a Kentucky corporation and that it acquired all its rights under its charter subject to the power of the State of Kentucky through constitutional provisions or legislative enactments to regulate and control the grant in the interest of the public.

The case of *Smith v. Alabama*, 124 U. S. 465, has been much quoted from; in this case it was said, in an opinion by Judge Matthews, page 476:

"A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time or place, he is liable in an action for damage under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent

damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in Sherlock v. Alling, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?"

We desire to close our quotations from the cases on this proposition with one State case—the case of Bagg v. Wilmington C. & A. R. R. Co., 109 N. C. 279.

The opinion in this case is a very able one, by Judge Avery, and is entirely devoted to a discussion of the power of the States to pass laws affecting interstate commerce. It is much too long to quote in full, but we earnestly recommend its careful consideration.

On page 281 the court says:

> "So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one Commonwealth to another, it is not repugnant to the Constitution of the United States, and *will be enforced, either as supplementary to partial Federal statutes relating to the same subject*, or in lieu of such legislation, where Congress has not exercised its powers at all. (Our italics.)
> Morgan S. S. Co. v. La., 118 U. S. 455;
> Train v. Boston D. Co., 144 Mass. 523;
> Smith v. Alabama, 24 U. S. 465;
> Railroad v. Alabama, 128 U. S. 96;
> Wilton v. Missouri, 91 U. S. 275;
> Railroad v. Fuller, 17 Wall. 560."

We submit to the court that the line of authorities as above laid down and quoted is too strong to permit of any doubt upon the question of the power of the State of Kentucky, either by its Constitution or statutes, to make reasonable regulations of the commerce of that State, even though such commerce shall be interstate commerce, so long as such regulations are in no way in conflict with the provisions of the Federal legislation in relation to such subjects and are in no way restrictive of interstate commerce.

We submit that the *conclusions* of the statutes and Constitution quoted in the former part of this brief fully meet these requirements, that complainant is entitled to have due force and effect given them, and under them, together with the Interstate Commerce Act, is entitled to all the relief prayed for in the bill.

VII.

The contract of the appellee with the Bourbon Company to deliver to it all live stock brought by the appellee to the city of Louisville is contrary to public policy and void, and its operation should be prevented by the courts.

Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a quasi public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

Such a trust having been established it follows, as a matter of course, that it is beyond the power of any railroad to make any contract with any one individual by which it secures to that individual a monopoly or the control of its services in a certain line of work.

The cases on this are almost innumerable, but we shall only attempt quotations from comparatively few.

In the case of McCoy v. C. I., St. L. & C. R. Co., 13 Fed. 3, the law laid down as outlined in the syllabus was as follows:

> "A railroad company can not bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but it is bound to transport over its road and to deliver to all stock yards at such point, reached by its tracks *or connections*, all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock yards discriminated against." (Our italics.)

In the case of L. E. & St. L. Consol. R'y Co. v. Wilson (late Indiana case), 18 L. R. A. 105, the rule as laid down in the syllabus is said to be:

> "A contract with a shipper of such character as to destroy the business of his rivals by giving him a monopoly is unjust, without regard to the consideration upon which it is based."

A case in the State courts often cited is that of Peoria & R. I. R. R. Co. v. C. V. M. Co., 68 Ill. 489. The decision in this case, as indicated in the syllabus, was as follows:

> "The primary consideration and principal object in the creation of railroad corporations, and in conferring upon them privileges not enjoyed by private citizens, was the accommodation of the public and the promotion of their interests. It was not merely to aggrandize and enrich the stockholders. The benefits to be derived by the stockholders are only incidental to accomplish the primary object.
>
> "The right conferred upon railroad corporations, in their charters, to carry passengers and property for a compensation, is coupled with a corresponding duty that they shall receive and carry passengers and freight over their roads as they may be offered. The acceptance of their charters is upon the implied understanding that they will fairly perform these duties to the public as common carriers of both persons and property, under the responsibility which that relation imposes.
>
> "The duties which railroad corporations owe to the public and which are the consideration upon which their privileges are conferred, can not be avoided by neglect, refusal, or by agreement with either persons or corporations. Therefore, any contract to prevent the faithful discharge of any of such duties will be against public policy and void."

The case of Inter-Ocean Co. v. Associated Press, 184 Ill. 438, deals with the rights of a telephone or telegraph com-

pany to make such a preferential contract. The court says, on page 448:

> "It has been uniformly held that a telegraph or telephone company is bound to treat all persons or corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. (People v. Western Union Tel. Co., 166 Ill. 15.) Where one is the owner of property which is devoted to use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse, and the public interest in such use may be of a widely variant character, but where the use is one in which the public is interested or has an interest, public control is necessary for the common good. (Munn v. People, 94 U. S. 113.)
>
> Page 451: "The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties can not be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto."

One of the clearest opinions that we have been able to discover on the validity and effect to be given to such contracts is that rendered in the case of *Chicago & Northwestern*

R. Co. v. People, 56 Ill. 365. In that case the court says, at page 374:

"Since the 10th of August, 1866, the Chicago & Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger & Armour, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

P. 380. "The contract in question is peculiarly objectionable in its character and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such an elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such a charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such

a system would be the cause, when fully developed and managed by unscrupulous hands.

"Can it be seriously doubted whether a contract, involving such a principle and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouses the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at chosen warehouses is a deliberate policy, to be followed for a term of years, during which these contracts run.

P. 383. "The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases."

Citing:

Mariott v. L. & S. W. R. R. Co., 28 Eng. Com. Law, 498:
Gaston v. Bristol & Exeter Railroad Co., 95 Eng. Com. Law, 641:
Crouch v. The L. & N. W. R. Co., 78 Eng. Com. Law, 254;
Sanford v. Railroad Company, 24 Penn. 382;
Rogers Locomotive Works v. Erie R. R. Co., 5 Green, 380;
State v. Hartford & N. H. R. Co., 29 Conn. 538.

Many other State courts have passed upon similar contracts. In an early case in Pennsylvania, the case of Sanford v. R. R. Co., 24 Pa. St. 375, Judge Lewis said, at page 382:

"The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public,

and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It can not be done except by the clearly expressed will of the legislative power. Limited means may, perhaps, limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individuals. If it possessed this power it might build up one set of men and destroy others; advance one kind of business and break down another, and might make even religion and politics the test in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate contract. Like the customers of a grist mill they have a right to be served, all other things equal, in the order of their application. A regulation, to be valid, must operate on all alike. *If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law and void.*" (Our italics.)

Many of the authorities on this point are collated by Judge Morrell in an opinion in the Hartford & N. H. R. R. Co. v. N. Y. & N. H. R. R. Co., reported in 3 Robertson, 411, where the court says, at page 415:

"Public policy is opposed to any infringement of the rights of travel or of any of the facilities which competition may furnish; and the law will not uphold any agreement which does or may injuriously affect such rights."
"Doolin v. Ward, 6 John, 194;
Hooker v. Vandewater, 4 Deins. 349;
Stanton v. Alton, 5 Deins. 434;
S. & B. R. R. Co. v. L. & N. S. R. R. Co., 21 Eng. L. & E. Rep. 319;
State v. H. & N. H. R. R. Co., 29 Conn. 538;
Hood v. H. & N. H. R. R. Co., 22 Conn. 502."

As early as 1839 the New Hampshire court had occasion to wrestle with this question, and their decision as indicated

in the syllabus of the case of Bennett v. Dutton, 10 N. H. 481, was as follows:

> "The proprietors of a stage coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not lawful that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such coach not to receive passengers who come from that place, on certain days, unless they come in his coach."

The Supreme Court of Kentucky was called upon in 1889 to pass upon a contract between competing steamboat lines containing an agreement on pool net earnings and stifle competition. This was in the case of Anderson v. Jett, 89 Ky. 375, where Judge Bennett said, at page 380:

> "That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the Commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in, utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy."

In the case of Pueblo, etc., R. R. Co. v. Taylor, 6 Colo. 1, the court had occasion to pass upon the validity of a contract made by a railroad company with certain individuals in one town whereby the company in consideration of a grant of land, etc., agreed not to connect its road with a

neighboring town. Judge Stone said, on page 8 of the opinion:

> "Railroad companies are held to be *quasi* public corporations and agencies, their directors acting in the double capacity as agents for the company and as trustees for the public, clothed with an important public trust. Their roads subserve public purposes to such an extent that the public may impose upon itself the burden of taxation to aid in their construction (St. J. & D. C. R. R. v. Ryan, 11 Kan. 608), and the lawful exercise of the right of eminent domain, in the taking of private property for the purpose of their construction, is put solely upon the ground of public use. When, therefore, the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. It logically follows that the public has a right to say that such companies shall not be permitted to make any contract which would prevent them from accommodating the public where entitled to it, in the matter of transportation and travel." (Court then quotes at length from case cited above.)

Coming to the Federal court, the first case we desire to quote from at length is one already cited and quoted from in an earlier part of this brief. The case of Coe v. L. & N. R. R. Co. A careful perusal of that case will show that the defendant therein, who is also the defendant herein, very early attempted to create a monopoly in the handling of live stock by a contract surprisingly similar to the one set up in its answer herein. The complainant in that case had a stock yards on the defendant's tracks and maintained the same for twelve years. At the end of that time the Union Stock Yards were built just outside the limits of Nashville, and defendant entered into a contract with the company owning the latter to make the Union Stock Yards its Nashville depot, and to deliver no stock billed to Nash-

ville at any other point of delivery, thus cutting off from complainant the deliveries of live stock which it had been accustomed to receive for twelve years past. The complainant applied for and obtained a prohibitory and mandatory injunction.

In the opinion granting the same, Judge Baxter said, on page 778:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee."

The court then asks (p. 779) whether railroads have the right to select in any city, one particular place of delivery in various industries and compel all to patronize that place, and says:

> "If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. *We think they possess no such power to kill and make alive.* Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the people. By such an unjust exercise of such power they could destroy the business

of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one comunity for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever." (Our italics.)

We have already shown, in another portion of our brief, that where a connecting carrier is in the position of a consignee, it is entitled to be treated just the same as any other consignee. The decision of the court in the foregoing case was that the contract was absolutely null and void and contrary to public policy, and that the deliveries must be made to the complainant and the Union Stock Yards Company, without discrimination.

We submit that, in this case, the contract should be regarded as of just as little value and deliveries should be made to the connecting carrier, the Southern Railway Company, at its points of connection, just as they were ordered to be made to the complainant in the case last above cited.

Another very strong opinion is that of Judge Baker in the case of the Interstate S. Y. Co. v. Ind. U. R'y Co., 99 Fed. 472. In this case Judge Baker says, at page 482:

"The business reserved to itself by the Belt Railroad & Stockyards Company in its lease of its railroad and railroad property to the Indianapolis Union Railway Company is that of maintaining and operating a stock yards for private gain. In the lease to the Union Railway Company the latter agrees to assist and encourage the stock yards business of the lessor company so far as it may lawfully do so. This stipulation does not authorize the Union R'y Co. to assist the Belt R. R. & S. Y. Co. in its private business as a stock yards company in creating and perpetuating a monopoly. It is not to be supposed, whatever may be the private views of the judge as to monopolies and trusts, that any self-respecting court could anywhere be found that would sanction by its decree

the creation or maintenance of a monopoly or trust, unless constrained so to do by some imperative requirement of law. It is firmly settled that a railway company can not discriminate, even in favor of itself, in respect of business which is not railroad business proper. (R'y Co. v. Dohn (2d Sup.), 53 N. E. 937; Parkinson v. R'y Co., L. R. 6 C. P. 554; Nev. & McM. 280; Ilwaco R'y & Nav. Co. v. Oregon S. L. & U. N. R. Co., 6 C. C. A. 495, 57 Fed. 673.

"By a stronger reason it will not be permitted to discriminate in favor of the business of another, even where, for a consideration moving to it in respect to its railroad business, it has contracted to protect and encourage such other business."

In the case of C. M. & St. P. R'y Co. v. Wabash R'y Co., 61 Fed. 993, Judge Caldwell says, on page 997:

"A railroad company is a *quasi* public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy and void. (Railroad Co. v. Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. v. State (Tex. Sup.), 10 S. W. 81; State v. Standard Oil Co. (Ohio Sup.), 30 N. E. 279; Texas & P. R'y Co. v. Southern Pac. R'y Co. (La.), 6 South. 888; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Salt Co. v. Guthrie, 35 Ohio St. 666; Stanton v. Allen, 5 Denio, 434; Hooker v. Vandewater, 4 Denio, 349; Chicago Gaslight & Coke Co. v. Peoples Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; W. U.

Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Sayre v. Association, 1 Duv. 143; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58.

In closing, we desire to call the court's attention to two decisions of this court.

In the case of Gibbs v. Consolidated Gas Co., 130 U. S. 396, it was said, on page 410:

> "It is also too well settled to admit of doubt that a corporation can not disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.
>
> "'Where,' says Mr. Justice Miller, delivering the opinion of the court in Thomas v. West Jersey R. Co., 101 U. S. 71, 83 (25:950, 952), 'a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy.'"

In the later case of United States v. Joint Traffic Association, 171 U. S. 505, there are many statements in the opinion of value in the consideration of the point in question. We desire to only quote briefly from the opinion on page 570, where it is said:

> "The building and operation of a railroad thus required a public franchise. The State would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking

for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government, which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States, such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered."

CONCLUSION.

We have endeavored and sought by the foregoing authorities to show that this case can be decided by reference to a few leading principles of law, and by their application we contend that the following points have been established:

I.

That under the Federal Statutes, and especially the Elkins Act, the Circuit Court had jurisdiction of the subject-matter.

II.

That the interest of the appellant is sufficient to maintain the suit.

II.

That no contract for "through routing" or "joint rates" is sought to be obtained by this bill.

IV.

That under the common law, Kentucky statutes, Constitution and Interstate Commerce Act, the appellee should be compelled to accept all stock destined for the Central Stock Yards, offered it at any point on its line, and deliver the same to the Southern Railway.

V.

That in making deliveries, as aforesaid, it should also give the shipper's instructions as to the further routing and destination of the stock.

VI.

That the Kentucky statutes and Constitution securing to the complainant the above rights are not such regulations as will be considered an improper interference with the right of the Federal Congress to regulate interstate commerce.

VII.

That the contract of the appellee with the Bourbon Company, relied upon by it as its defense and excuse for the discriminations sought to be prevented, is illegal and void, and should so be declared by this court.

VIII.

That appellee, as a common carrier, can be compelled to do business in the usual and customary way, and as live stock of necessity must be transferred in bulk, such transfer by one common carrier to another for delivery purposes only, and within the switching limits of the city of destination, in conformity to a State police regulation, is not an unreasonable requirement or interference with interstate commerce.

Respectfully submitted.

J. C. DODD,
W. M. SMITH,
W. D. WASHBURN,
Counsel for Appellant.

JOHN L. DODD,
of Counsel.

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No. 149

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Supreme Court of the United States,

OCTOBER TERM, 1902.

THE CENTRAL STOCK YARDS COMPANY, - - - - - *Appellant,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Appellee.*

Jefferson Circuit Court,

CHANCERY DIVISION.

THE CENTRAL STOCK YARDS COMPANY, - - - - *Plaintiff,*

No. 20369. VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Defendant.*

OPINION OF THE COURT BY

JUDGE SHACKELFORD MILLER.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.



Jefferson Circuit Court.

CHANCERY DIVISION.

CENTRAL STOCK YARDS CO., - - - *Plaintiff,*

No. 80269. *VERSUS*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Defendant.*

Opinion.

This is an action by the Central Stock Yards Company, in which it asks a mandatory injunction against the Louisville & Nashville Railroad Company compelling it to switch and deliver to the Southern Railway Company in Kentucky, at one of the points of physical connection between the tracks of these two roads in Louisville, six car loads of live stock, which have been shipped over the Louisville & Nashville road to the Central Stock Yards, and to so switch and deliver in the future all like freight that may be brought by it, destined to the Central Stock Yards, and that it be compelled to receive, switch, and deliver all live stock offered to it for shipment over its lines to the Central Stock Yards. A temporary order was granted in accordance with the prayer, and the six cars have been delivered to the Southern Railway and by it to the Central Stock Yards. The action is now submitted upon plaintiff's motion for an injunction pending the preparation and trial of the action upon its merits. The Central Stock Yards are owned by the Central Stock Yards Company, and are situated upon the line of the Southern Railway, about nine

miles from its terminus in Louisville, and just beyond the southeastern limits of that city. The "break-up yards" of the L. & N. R. R. are near the intersection of Fourth and G streets in South Louisville, and only about a hundred yards from the Central Stock Yards. The L. & N. R. R. Company's tracks and the tracks of the Southern Railway intersect at this point. There is also physical connection by switch between the tracks of the two roads at Seventh and Magnolia streets, which is about a mile and a half northeast of the "break-up yards." This last route is and has been in constant use for quite a while, in transferring cars as is here asked.

The plaintiff, the Central Stock Yards Co., shows that it has constructed and has in operation a modern stock-yard plant, and that its business is that of feeding, watering, properly caring for, having sales made of and the safe loading and unloading of live stock of every character; that the lines of the defendant, the Louisville & Nashville Railroad Company, extend through the principal counties in Kentucky wherein live stock is raised in any considerable quantity for sale; that more than fifty per cent of all the live stock raised in Kentucky can reach a market therefor only over the lines of the defendant; that defendant has announced its purpose to decline to receive at any station on its line any live stock to be billed, transported, transferred, or switched to any connecting carrier, and particularly to the Southern Railway Company at Louisville for delivery by such connecting carrier to the plaintiff's yard, or to any person thereat, and that in keeping with its said announced purpose defendant has distributed circulars throughout the country and given instructions to all of its station agents and employes not to receive, bill, transport, transfer, or switch any live stock at any of the points of physical connection between its lines and those of the

Southern Railway Company in Kentucky at Louisville for delivery by the latter company to plaintiff, or any one at its yards. It alleges that such action on the part of the defendant was and is unlawful, arbitrary, and discriminating against plaintiff and other persons doing business with plaintiff, of great injury to plaintiff, and that the injury so inflicted was and is of a continuing character not susceptible of actual pecuniary estimation, and that resort to actions at law will involve a multiplicity of suits, none of which could or would end the litigation, and therefore the only adequate remedy is in equity and by injunctive process.

The defendant presents three defenses:

First. That the shipper and not the plaintiff Stock Yards Company is the party injured, if any one is injured, and that the Stock Yard Company can not therefore maintain this suit.

Second. That it has heretofore established and furnished a sufficient depot, known as the Bourbon Stock Yards, with sufficient facilities for the handling, feeding, and caring for all live stock coming to the city of Louisville, and that it is not required to establish any other live-stock depot in said city; and

Third. It admits that it can make a delivery of all live stock consigned over its line to the Southern Railway Company at Louisville, Kentucky, and destined to the Central Stock Yards, or to the plaintiff, Central Stock Yards Company, or in its care, but that to do so, the said Louisville & Nashville Railroad Company will or may have to employ a special engine to take such live stock directly from its yards at South Louisville to the Magnolia and Seventh Avenue connection of its tracks with the tracks of the Southern Railway Company in Kentucky at Louisville, for delivery by such latter road to said Central Stock

Yards Company, and that in so doing the engine would have to get behind these live-stock cars and push them into this point of physical connection, and that an extra engine and crew will have to be employed.

This action is based upon Section 213 of the present Constitution of Kentucky, which reads as follows, in so far as it applies to railroads:

> "All railroad . . . companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad in this State, *shall* receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities coming to or going from any railroad, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor in any matter as to payment, transportation, handling or delivery; and *shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies.*"

The defendant, by way of answer to the demand of plaintiff that defendant be required to comply with the mandatory section of the Constitution, says it has, by contract with the Bourbon Stock Yards Company, established that place as its live-stock depot in the city of Louisville. The fourth clause of that contract reads as follows:

> "The first party agrees that it will not lease, rent, or sell any of its ground in the city of Louisville for the establishment of a stock yard, or otherwise facilitate the establishment of a stock yard, in the said city, and will establish no other stock depot in the said city, and that it will deliver and cause to be delivered to the second part, so far as it legally may, all live stock shipped over the roads of the first party and consigned to the city of Louisville, and should

any live stock be shipped to other person or persons in said city, the first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city, and agrees to unload all live stock shipped to said city at the yards of the second party, *but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions and the second party shall, at its own cost and expense, defend any and all litigations which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom.*"

In this connection, counsel for plaintiff cited Section 214 of our Constitution, which reads as follows:

> "No railway . . . company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."

1. In answer to the objection that the plaintiff has no right to maintain this action, it is clear that plaintiff is vitally interested in the result of the action and that the ultimate success of its stock-yard business is largely dependent upon requiring the defendant to comply with the provisions of the Constitution *supra*, and further, that injunctive process is the only adequate remedy. This is shown by the stock-yard cases relied upon by counsel for defendant.

In Covington Stock Yards Company v. Keith, 139 U. S. 128, an injunction was granted and the decree appealed from was affirmed, which necessarily held that such remedy was the only adequate and proper one for such state of case.

In Butchers' & Drovers' Stock Yards Co. v. L. & N. R. R. Co., 14 C. C. A. 290, 67 Fed. Rep. 41, objection was raised to the right to maintain such suit because of the

continuous supervision by the court which would become necessary if such relief was had. In overruling that contention, Judge Taft said:

> "It is said that the court of equity will not attempt to enforce the remedy here sought, because it will involve a continuous supervision by the court of transactions between the complainant and the defendant, which would tax the court with the details of superintendence beyond anything a court of equity will undertake; and a number of cases are cited to the point. We think the objection can not be sustained."

And in Interstate Stock Yards Co. v. R. R. Cos., 99 Fed. Rep. 483, the court said:

> "The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does not apply where the subject-matter of the litigation is to prevent discrimination in violation of the Interstate Commerce Act."

High on Injunctions, Section 616, and a great number of authorities, might be added in support of the doctrine above enunciated in the Interstate Stock Yards Company case.

The question as to whether or not the defendant, the Louisville & Nashville Railroad Company, shall be required

by this court to establish and furnish any live-stock depot other than the Bourbon Stock Yards for the handling, feeding, and caring for live stock transported by the Louisville & Nashville Railroad Company, is not involved in this case.

It is not asked in the petition that the Louisville & Nashville Railroad Company make delivery to the Central Stock Yards Company, or to any person at its yards, or to any stock yards located upon its lines. *On the contrary, this is purely and simply a switching case under Section 213 of the Constitution* so far as the facts set forth in the petition are concerned. For the sake of the argument, the defendant's contention that it will not be required to furnish more than one live-stock depot in a city may be admitted, but that fact would not, in my opinion, affect the question presented for decision. The petition in this case is fashioned after the petitions in the numerous cases of a like kind which have been cited upon this hearing. I am of opinion that the petition states a cause of action, and that the plaintiff may maintain it.

2. In considering the second ground of defense, it is important to keep in mind the fact that plaintiff is proceeding under the express authority and letter of the Constitution bearing directly upon the point under consideration.

The numerous cases cited on the oral argument may be classed in somewhat general terms (1) as stock-yard cases proper, and (2) cases involving interchange of cars at physical connections of railways. The first class of cases have been generally decided upon the general principles of the common law as applicable to common carriers, while the second class is governed by Constitutions or statutes.

It is a mistake to say that we have, in the case at bar, a stock-yard case proper. This latter class properly em-

braces only those cases in which the courts have considered how far the law would compel the delivery of live stock at some stock yard in a given city other than the one owned and controlled by the carrier itself, or operated through some agency which the carrier has selected. Covington Stock Yards Co. v. Keith, 139 U. S. 128, is a case of that class.

As we are not now considering exclusively a stock-yard case, it is not vital that we look to these cases. But let us see if the numerous cases in this class can be said to establish any general rule. I think they establish this rule only: That where the carrier furnishes its own stock yards, either by building them itself or adopting the yards of another, it can not be compelled *under the common law* or the Interstate Commerce Act to furnish any other stock yard or any appliances therefor for loading or unloading live stock at any other point in the city upon its own lines than that at its own yards.

But where ample facilities for loading and unloading are furnished by another line, and yards are there erected on the other carrier's track, so that the carrier may deliver stock with equal safety at said yards, then such delivery may be required certainly under our Constitution, if not at common law.

If this latter proposition is put in doubt by some conflict of authority, under the common law it is certain that wherever there is statutory or constitutional enactment looking to a prohibition of any discrimination in regard to the delivering, handling, care, and custody of freight, there can be no such discrimination, and similar treatment may be demanded by all in the same business.

Section 214 of the Constitution does not mean that a carrier must build platforms or chutes, etc., for any and all who may want stock yards on the line of the road, but it

does mean that all individuals and all corporations engaged in the stock-yards business must be treated alike, and no exclusive or preferential contract for the care and custody of stock can be made.

We have here nothing to do with the modification made in Section 215 on the subject of freight rates between two given points on the same road, or with the meaning of the words "freight of the same class and on the same conditions" found in that section.

But aside from Section 214 and independent of it, the case we are considering comes clearly within the provisions of Section 213 of the Constitution, where the matter of shipments to points where there is physical connection between railways is considered.

The terms of this section are explicit, and no amount of argument can make its meaning clearer than that expressed by its very words. But if there were any doubt as to the meaning of the Constitution and we were required to look to the debates of our Constitutional Convention or to the decisions of the courts upon similar questions for aid, we are still further fortified in the conclusion heretofore reached.

From the debates of the Constitutional Convention (Vol. 4, pages 5118 to 5162), it will be seen that the convention, in the interest of the general public, recognized the fact that it is no proper business of a common carrier to foster particular enterprises, but that deriving its franchise from the legislature and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all of its patrons upon an *absolute equality*.

Railroad Company v. Goodridge, 149 U. S. 680.

Public policy forbids that common carriers shall be permitted to favor one shipper, or one class of shippers, in discharging the general duty to accept and carry goods without discrimination or prejudice between classes.

L. & N. R. R. Co. v. Pittsburgh & Kanawha Coal Co., decided November 13, 1901, by Court of Appeals of Kentucky, but not yet reported.

As incidental to the operation of a railroad, it has the power to interchange cars with a connecting carrier, and such is the ordinary and usual way of doing business between common carriers; and the overwhelming weight of authority is to the effect that common carriers may, by constitutional requirement or legislative enactment, be compelled to interchange cars, the one with the other, for delivery on the line of the one or the other to a named consignee.

Jacobson v. Wisconsin, Minnesota & Pacific R. R. Company, 71 Minn. 532; S. C., 40 L. R. A. 392; 70 Am. St. Rep. 364.
Burlington C. R. & N. R. R. Co. v. Dey, 82 Iowa, 334, 335, 336; S. C., 12 L. R. A. 436.
Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 139, 140.
Michigan C. R. Co. v. Smithson, 45 Mich. 221, 222.
The case of Inman v. St. Louis S.-W. R. Co., 37 S. W. Rep. 37, reviews the authorities at length and is in point.

In the Jacobson case, *supra*, the Supreme Court of Minnesota, in passing upon the constitutionality of a legislative enactment requiring substantially what Section 213 of our Constitution requires, concludes its decision in the following language:

"We are clearly of the opinion that the legislature has the power to compel a common carrier to do busi-

> ness in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered."

In our Court of Appeals, in the case of R. R. Co. v. Williams, 95 Ky. 199, the defendant relied upon Section 213 of the State Constitution as an exemption from liability for damages, because it had been compelled by Section 213 to receive the car which had caused the accident. The court recognized the inability of the company to refuse the car, but decided the case upon another point, saying:

> "It seems to us the constitutional provisions by which one railroad company is compelled to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe to those who were required to handle them, it is the duty of the company to refuse to receive the car if such defect exists, *and no other construction, it seems to us, can well be given this clause of the Constitution.*"

It thus affirmatively appears that our Court of Appeals has construed Section 213 of our Constitution to the effect that if a car offered to a connecting carrier is not unsafe, it is, by the said constitutional provision, required to accept it.

In the Smithson case, *supra*, 45 Mich., at page 222, in considering a legislative enactment similar to the provisions of Section 213 of our Constitution, Judge Cooley said:

> "The necessities of commerce required this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual."

In Peoria, &c., R. R. v. R. R. Co., 109 Ill. 139, the Supreme Court of Illinois held that common carriers, even in the absence of a statute, were required to interchange cars, and in reaching such conclusion used the following language:

> "It is a matter of so much public concern that judicial notice may be taken of the fact, that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if indeed it would be possible, to transact the commercial business of the country."

In Inman v. St. L. S.-W. R. Co., 37 S. W. Rep. 37-45, an elaborate review of the authorities will be found, and the constitutionality of a legislative enactment similar to the constitutional provision as contained in Section 213 of our Constitution, is upheld.

In the Iowa case, *supra*, Vol. 82, page 336, S. C., 12 L. R. A. 436, the Supreme Court of that State, in passing upon and upholding the constitutionality of a statute similar to the constitutional requirements of Section 213 of our Constitution, said:

> "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common

carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road. (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135.) As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed can not be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies."

Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

McCoy v. C. I. St. L. & C. R. Co., 13 Fed. Rep. 3;
Coe v. L. & N. R. R. Co., 3 Fed Rep. 778;
Interstate Stock Yards Co. v. R. R. Cos., 99 Fed. Rep. 472;
L. E. & St. L. Consol. R'y Co. v. Wilson (late Indiana case), 18 L. R. A. 105.

In the McCoy case, *supra*, quoting from the syllabus, it is said:

"A railroad company can not bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but it is bound to transport over its road and deliver at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock yards discriminated against."

In the Coe case, *supra*, the court said:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their owr private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights, offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee."

In the Wilson case, *supra*, quoting from the syllabus, it is said:

> "A contract with a shipper of such character as to destroy the business of his rivals by giving him a monopoly is unjust without regard to the consideration upon which it is based."

At common law, therefore, and independent of the mandatory provisions of Section 213 of our Constitution, it would seem that it is the duty of the Louisville & Nashville Railroad Company to make delivery of live stock to the Southern Railway Company at one of the points of physical connection between its tracks and the tracks of the said Southern Railway Company in Louisville for delivery by the latter company to the Central Stock Yards, because such a delivery is practicable.

I have carefully examined the cases relied upon by the defendant. In my opinion, they are all easily distinguishable upon principle from the case at bar.

The case of Butchers' & Drovers' Stock Yards Company v. L. & N. R. R. Co., 67 Fed. Rep. 36 (14 C. C. A. 290), was not at all like the case at bar. The first sentence in the statement of facts by Judge Taft is as follows:

"This was a suit by the Butchers' & Drovers' Stock Yards Company against the Louisville & Nashville Railroad Company, *to compel it to build a spur track connecting with complainant's yards.*"

It was not a "switching" case, and there was no constitutional or statutory provision covering the case.

The case of Covington Stock Yards Company v. Keith, *supra*, merely holds that under the common law a railroad company is only required to furnish a sufficient depot upon its own lines with sufficient facilities for the business at any city. The plaintiff is not asking that the L. & N. have any other depot than the Bourbon Stock Yards, nor should it be forgotten that the Keith case was decided upon the common law, as was the Butchers' & Drovers' Stock Yards Company case; and as this case is purely and simply a *switching cose under the* 213 *Section of the Constitution*, those cases can not be said to be in conflict with the conclusion heretofore reached.

It was strenuously contended for the defendant that in the case of L. & N. R. R. Co. v. Commonwealth, 22 Ky. L. R. 328, the constitutional provision invoked herein was construed, and that the same is in harmony with the Keith case and the Butchers' & Drovers' case, *supra*. It is plain, however, that that case was solely and exclusively a *rate case* and required a construction of Section 215 of the Constitution, under which the indictment was found. It is true, that in that case the Court of Appeals held that the iron-bound rule as determined by Section 214 of the Constitution was modified by the qualifying words "*Upon the same conditions*" contained in Section 215 of the Constitution; but we may search each and every section of the Constitution and nowhere will there be found any qualifying words or limitation clause upon the mandatory requirements as contained in Section 213, and a most careful

analysis of the majority opinion in that case will show conclusively that it is not applicable, as an authority, to this case.

In brief, the question is, Shall a common carrier, acquiring its existence and powers from the State, be required to obey the Constitution of the State? In none of the cases relied upon by defendant was this the question for decision. All of those cases were tried under the common law as applicable to carriers. It must be admitted that the State has the power to compel its railroad corporations to exchange freight with each other. It can even require the carrier to deliver live stock at every stock yard on its line, but it has not done so. If there had been such a constitutional provision in Kentucky and Tennessee, it is clear that the Covington Stock Yards case and the Nashville Stock Yards case would have been decided in favor of the stock yards. If the State may go so far as to alter, amend, and even repeal the charter of a railroad company, it certainly has the power of imposing a mere regulation as to the forwarding of freight. And the State, having in its Constitution expressly required the defendant to receive and exchange cars from and with other roads, it is perfectly plain that the "stock-yard" cases, decided upon common-law principles, are not at all applicable to this case. This is not a "stock-yard" case under the common law, but a "switching" case under the Constitution.

3. Can mere inconvenience, and a moderate expense, excuse defendant from exchanging cars with other roads?

The testimony for the defendant shows that the distance from the South Louisville break-up yards of the Louisville & Nashville Railroad Company to the point of physical connection between its tracks and those of the Southern Railway Company at Seventh and Magnolia is about one and one half miles. It further appears that the distance

from the point of physical connection between the roads at Seventh and Magnolia to the Central Stock Yards is about one and one half miles, the two making a total distance from the Louisville & Nashville Railroad Company's South Louisville break-up yards via the Seventh and Magnolia physical connection with the Southern Railway Company to the Central Stock Yards of three miles, which is not quite half the distance between the said South Louisville break-up yards of the Louisville & Nashville Railroad Company and the Bourbon Stock Yards.

It also appears from the testimony of W. A. Evans, who was for twenty-three years yardmaster of the Bourbon Stock Yards, that if the Louisville & Nashville Railroad Company is required to handle live stock from its South Louisviile break-up yards to the Central Stock Yards in the same manner that said road handles stock to the Bourbon Stock Yards, a distance of about five miles in transportation of live stock is saved.

It is contended by plaintiff that where a common carrier is required to do a specific thing by a mandatory constitutional provision or legislative enactment, the question of inconvenience is put at rest by such requirement and the act must be done.

It is a conceded fact in this case that the Seventh and Magnolia streets connection is a physical connection between the tracks of the two railroad systems, and this is more than corroborated by the positive testimony as contained in the affidavits of B. H. Young and B. S. Josselyn.

Furthermore, it appears that live stock can be delivered promptly and regularly from the South Louisville break-up yards of said Louisville & Nashville Railroad Company immediately to said Magnolia street connection with the Southern Railway. In his affidavit, the president of the defendant says:

> "If cars of live stock are to be delivered promptly and regularly from the L. & N. yards at South Louisville immediately to the said Magnolia Street track, without going first to the Oak Street yards of the L. & N. R. R. Co., it will practically require the service of another switch engine and crew to do this work."

In the case of C. & N. W. R'y Co. v. The People, 56 Ill. 376, the same question of additional expense was raised as an excuse for not making immediate delivery of grain, and in response to the contention the Supreme Court of Illinois said:

> "It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions is, that those divisions connect with the line on West Water Street only by a single track, and that respondent can not deliver bulk grain or other freight to the elevator of relators, even from those divisions, *without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars*, while the same are being delivered and unloaded at said elevator and brought back. *As a reason for non-delivery on the ground of difficulty, this is simply frivolous.*"

Section 216 of the Constitution provides for mere physical connection where it is *reasonable or feasible*, but does not provide for interchange of business. But after such connection is made, the question of reasonableness and feasibility is ended, and the matter of interchange of business is relegated to Section 213, where the interchange is required.

This interchange is to be done in the usual and customary way—which is by the transfer and delivery of empty or loaded cars coming to or going from the connecting roads. The commerce of the country would not tolerate the system

which required the unloading and reloading of live stock or even dead freight at connecting points (Peoria, &c., v. Chicago, &c., 109 Ill. 135). The framers of the Constitution were aware of this; hence the broad and comprehensive language of Section 213, which in effect provides for such interchange of business in the customary way. See in this connection Jackson, &c., v. Wis., &c., 40 L. R. A. 392.

If we look at the case as one in which the convenience of the Louisville & Nashville Railroad is to be taken into the account, still, there is no reason why delivery of live stock at this Seventh and Magnolia connection may not be required when the stock comes from the L. & N. to the Southern, as confessedly every day such stock bound for the northern market is delivered by the Southern to the L. & N. at such connection.

It takes a shorter time to make the delivery from the break-up yards of the L. & N. to this connection with the Southern than it does to make it to the switch leading to the Bourbon Yards, and the same switching and delay occurs at either connection or switch, the distance being greatly to the advantage of the Seventh and Magnolia connection.

There is no issue in the case as to the rate for freight carried. The defendant gets its full rate to Louisville and its charge for the additional use of its cars is compensated for by the reciprocal interchange of cars or by the usual trackage contract in force between railways using each other's cars.

No difficulties of this kind are suggested by defendant, and the refusal shown by the circular letter of the defendant is not placed on this ground.

The refusal is based on the plea of inconvenience, and this, if allowed to prevent the delivery to the Southern road at this point of connection, will be sufficient to prevent

interchange of business at most, if not all, connections of carriers, as such transfer of cars is always attended with some inconvenience. This inconvenience, however, is insignificant as compared with the necessities of commerce, which requires the interchange of cars at all points of physical connection between railways.

Of course, the Constitution does not require impossibilities; but here the interchange is shown to be both possible and practicable. Indeed, it is being constantly made in other kinds of freight—the defendant declining only to receive cars loaded with live stock destined to plaintiff's yards.

I am of opinion that plaintiff's motion for an injunction ought to be sustained, and it will be so ordered.

SHACKELFORD MILLER,

Judge.

NOVEMBER 23, 1901.

Kentucky Court of Appeals.

CENTRAL STOCK YARDS CO., . . *Plaintiff,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD CO., ... *Defendant.*

ORDER.

After reading the record, evidence, and authorities cited, and considered the very able arguments, both oral and written, of counsel upon the motion of the Louisville & Nashville R. R. Co. to dissolve the mandatory injunction granted in this case on the 23d of November last by the judge of the Chancery Division of the Jefferson Circuit Court, I have concluded that the motion should be overruled, and it is so ordered.

As the circuit judge has written a very full opinion and the case will probably come before the Court of Appeals for final judgment in a short time, I deem it unnecessary to write out the grounds of my conclusions as to the temporary injunction now before me.

(Signed) A. R. BURNAM,
Judge of the Court of Appeals.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

CENTRAL STOCK YARDS COMPANY, - - - Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

BRIEF FOR APPELLEE.

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P. C. NUNEMACHER PRESS, LOUISVILLE, KY.

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Supreme Court of the United States

CENTRAL STOCK YARDS COMPANY, ... *Appellant*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

BRIEF FOR APPELLEE.

More than twenty years ago the Louisville & Nashville Railroad Company, which then brought, as it now does, a very large amount of live stock to the city of Louisville, found it necessary to establish a live stock depot in order that the stock might be properly attended to when it reached its destination. Live stock can not be turned loose like passengers, nor wheeled away and piled up on top of each other like dead freight. They have to be fed and watered and cared for in a manner consistent with their necessities and appropriate to their preservation. Therefore railroad companies handling a large amount of live stock into a place like the city of Louisville have found it essential to establish live stock depots just as they establish passenger depots and freight depots.

In 1880 the Louisville & Nashville Railroad Company entered into a contract with the Bourbon Stock Yards Company by which it was mutually agreed that the Bourbon

Stock Yards should be the live stock depot of the Louisville & Nashville Railroad Company for the city of Louisville; that the Railroad Company would receive and deliver live stock at that place only; that it would not establish any other live stock depot and would not aid in or facilitate the establishment of any other; and in which it was also agreed that the Bourbon Stock Yards Company should at all times furnish ample facilities for the prompt and proper handling of live stock, and should at all times have on hand an ample force of men skilled in this particular line of business, who could and would give that attention to the live stock which its necessities demand. Careful provision was also made that all charges by the Bourbon Stock Yards Company, in case owners of stock should choose to leave it with the Stock Yards Company, should be reasonable. For the loading and unloading of stock upon and from the railroad cars the Louisville & Nashville Railroad Company was to pay the Bourbon Stock Yards Company; but no charge at all has ever been made for this service against the shipper or owner of the stock. It is unloaded from the cars, and kept at the Stock Yards for a reasonable length of time to give the owner a chance to take it away, without any charge whatever against him. And, on the other hand, it is received at the Stock Yards and loaded onto the cars without any charge against the owner or shipper.

This contract as made in 1880 has been continued substantially in the same form to the present date. It was renewed in 1888 and again in 1898. A copy of it will be found in the printed record, beginning at page 17. On the faith of this contract both the Louisville & Nashville Railroad Company and the Bourbon Stock Yards Company have expended a large amount of money in providing facilities for the proper handling of live stock at this depot; and both

parties have faithfully kept the agreement between them since the day it was made. The Bourbon Stock Yards Company has provided the amplest facilities for the handling of all live stock that comes to the Louisville market, and has at all times kept on hand a sufficient force of skilled men to give the stock that attention which it requires. On the other hand, the Louisville & Nashville Railroad Company has steadfastly and consistently refused to receive or deliver live stock for the Louisville market at any other place than this depot which it established at the Bourbon Stock Yards. Around this depot, that is to say in its vicinity, have grown up large packing establishments, where large quantities of live stock are butchered and packed; and although it would have been a convenience for these establishments to have special deliveries of live stock on their own side tracks connecting with the line of the L. & N., yet the Railroad Company has steadfastly refused to make any such special deliveries to any one, but has uniformly and continuously delivered only at its live stock depot at the Bourbon Stock Yards.

As to the foregoing statement of facts, there is no controversy in the record. The statement in the affidavit of Mr. Walker D. Hines (Rec. p. 14) as to the nature of the facilities and the manner of handling live stock at this depot, showing that the facilities are ample for the handling of all live stock which comes to the Louisville market, and that the manner of handling the same has been skillful and proper, is not controverted by any one. Likewise his statement (Rec. p. 13) that the Louisville & Nashville Railroad Company has always steadfastly refused to receive or deliver live stock for the Louisville market at any other place than its said live stock depot is not only uncontroverted, but is corroborated by the statement of appellant's

superintendent, Mr. Byrne, who states the same thing in effect, and says that no butcher or packer purchasing stock coming to the city of Louisville can get a delivery from the Louisville & Nashville Railroad Company at any other place than at the Bourbon Stock Yards. (Rec., p. 31.)

The establishment and maintenance of this live stock depot by the Louisville & Nashville Railroad Company has been mutually beneficial both to the public and to the Railroad Company. The public have been well and promptly served; and, on the other hand, the existence of this ample and convenient live stock depot on the line of the Louisville & Nashville Railroad Company has attracted this class of traffic to the Company. Moreover, when live stock is brought to the Louisville market and sold at the Bourbon Stock Yards, a great deal of it is bought for persons in other markets, and is thereafter shipped east; and being right on the line of the Louisville & Nashville Railroad Company, a large part of it which is thus shipped east goes over the line of the Louisville & Nashville Railroad Company from Louisville to Cincinnati, where further eastern connections are made.

Within the last year a corporation styled the Central Stock Yards Company has established a stock yards and located the same on the line of the Southern Railway, and has made a contract with the Southern Railway under which the Central Stock Yards are created *the live stock depot for Louisville of the Southern Railway.* Since the establishment of these stock yards the Louisville & Nashville Railroad Company has simply pursued *exactly the same course as to live stock which it brings to the city of Louisville that it has been pursuing for twenty years past. It has insisted upon delivering such live stock only at its live stock depot at the Bourbon Stock Yards.* And the purpose of this present

suit is to secure an injunction prohibiting the Louisville & Nashville Railroad Company from delivering live stock thus brought by it to the city at its *own live stock depot*, whenever the shipper prefers that it should go to *the depot of the Southern Railway*, and requiring the Louisville & Nashville Railroad Company to deliver its cars containing such live stock to the Southern Railway at a point in the city where it has a physical connection with the Southern Railway, so that the Southern Railway may take these L. & N. cars of live stock *to the Southern Railway depot at the Central Stock Yards.*

In order that the court may more clearly understand the local situation, we insert a diagram, not prepared by a skilled draughtsman, but by ourselves, and which is not precisely accurate, but which shows approximately the situation. The lines of the Louisville & Nashville Railroad on that diagram are indicated in red, and the lines of the Southern Railway are indicated in black. The Bourbon Stock Yards, which constitute the live stock depot of the Louisville & Nashville Railroad Company, are likewise indicated in red, and the Central Stock Yards, which constitute the live stock depot of the Southern Railway, are indicated in black.

The Louisville & Nashville Railroad Company enters the city of Louisville both from the south and from the east. These two lines originally belonged to different corporations and terminated at different depots in the city. They have, however, both come into the ownership of the Louisville & Nashville Railroad Company, and are now connected by a line appearing on the accompanying diagram running in a northeast and southwest direction, connecting the east-bound line with the south-bound line.

The major part of the live stock coming to the city of Louisville over the Louisville & Nashville Railroad Com-

pany's line comes from the south. It first reaches the yards of the Louisville & Nashville Railroad Company at South Louisville, indicated at the point A on the diagram. From these yards at South Louisville the live stock cars are taken direct in a northeasterly direction to the live stock depot at the Bourbon Stock Yards, where they are unloaded. If the live stock comes from the east, of course it is taken direct to the Bourbon Stock Yards without coming to South Louisville. The line of the Louisville & Nashville Railroad coming from the south continues in the same line northwardly through South Louisville to the main depot on Broadway, about three miles north of South Louisville. Between Broadway, which is the northern terminus of the line, and Kentucky Street, which is several blocks south of Broadway, the Louisville & Nashville Railroad has very extensive distributing yards, to wit, yards where cars are shifted around and from which special deliveries of dead freight to different sidings of adjacent industries are made. In this connection we should explain that the point referred to in the record and on the diagram as South Louisville is in the city of Louisville, but is referred to as South Louisville merely for convenience, because it is in the extreme southern portion of the city, just as the territory about the Bourbon Stock Yards is referred to as East Louisville, because it is in the extreme eastern portion of the city.

From the foregoing explanation it will be seen that all live stock destined for the Louisville market, when arriving from the south, is carried to the Bourbon Stock Yards over the connecting track which runs from South Louisville in a northeasterly course to the Bourbon Stock Yards at East Louisville. The tracks from South Louisville, northwardly toward Kentucky Street and Broadway, are greatly crowded with traffic. The record shows there is so much traffic from

South Louisville to the Kentucky Street yards that, as to dead freight which may be destined for intermediate points between South Louisville and Kentucky Street, the switch engine which takes cars at South Louisville does not stop to make any special deliveries between South Louisville and Kentucky Street, but takes all of the cars straight through to the Kentucky Street yards; and it is afterwards distributed from those yards by another switch engine. (See the affidavit of Mr. Hines, Rec., p. 17.)

The Southern Railway enters the city of Louisville, as shown by the accompanying diagram, in the southeastern part of the city and pursues an extremely circuitous route, running west through the southern portion of the city, then north through the western portion of the city, and finally east through the northern portion of the city, reaching its depot at Seventh Street in the city of Louisville, near the Ohio River. The result of this very circuitous route is that although the Central Stock Yards are situated just a few yards east of the boundary line of the city of Louisville, to wit, at or about the point G on the accompanying diagram, they are nine miles from the depot of the Southern Railway at Seventh and the river. We make this explanation at this point because there is a feeble effort in the record to claim that the Central Stock Yards is *not a Louisville point*, but should be treated as any other station or town on the line of the Southern Railway, such as Versailles, Shelbyville, Lexington, etc., and reference is made to the fact that it is nine miles from Louisville. The meaning of this is that it is nine miles from the Southern Railway depot in Louisville on account of the extremely circuitous route of that railway through the city. But, as heretofore said, it is in fact only a few yards outside of the city limits. And the contract between the Southern Railway and the Central

Stock Yards Company shows that these Stock Yards are made *the Louisville live stock depot of the Southern Railway*. (Rec., pp. 41, 42.)

In the record it is said that there are three points of physical connection between the Southern Railway and the Louisville & Nashville Railroad at which cars can be exchanged between the two lines.

(1.) One is referred to in the record as the Bergen & Meehan switch. This is at the point F on the diagram, where the L. & N. track, running from South Louisville to East Louisville, crosses the Southern Railway. But it is shown by the uncontradicted statement of Mr. Hines that this is in fact not a connection between the two lines. This siding, which makes a physical connection with the Southern Railway and also with the Louisville & Nashville Railroad, is a mere private siding which belongs to Bergen & Meehan, and which is not open to general use either by the Louisville & Nashville Railroad or the Southern Railway. (Rec., p. 15.)

(2.) Another point of physical connection is referred to in the record as the Fourth Street crossing. This is the point B on the diagram. But as to this crossing, Mr. Hines explains, and his explanation is not denied, that it would be not only impracticable but dangerous to attempt to exchange traffic at this place. There are no side tracks here, other than the short curved track which makes the connection between the two lines. In other words, there is no track at this point upon which cars could be set off by one company to be taken up by the other. The main lines of the Louisville & Nashville Railroad Company and the Southern Railway cross each other at this point, over which the passenger trains of the two companies pass. Furthermore, the Southern Railway at this place has

only a single track. The result would be that if the Louisville & Nashville Railroad Company should attempt to deliver live stock to the Southern Railway at this point, it would have to set these live stock cars out on the main single track of the Southern Railway, where they would be in the way of all the regular trains, both freight and passenger, coming to or going from the city of Louisville. And the same would be true if the Southern Railway should attempt to deliver cars to the Louisville & Nashville Railroad Company. The only way in which exchanges could be made at this point would be for the respective engines of the respective lines to meet at this point of connection in order that the cars dropped by one engine should be immediately taken up by the cars of the other engine and carried away. See affidavit of Mr. Hines, p. 15.

(3.) The third point of connection is what is known as the Seventh and Magnolia Avenue connection, and is shown on the diagram at the point C. There is a line which runs off from the main line of the Southern Railway at the point E in Magnolia Avenue, and runs eastwardly along Magnolia Avenue to a connection with the Louisville & Nashville Railroad at the point C. This line from E to C is said to belong to the Southern Railway. At the point C it makes connection with the Louisville & Nashville Railroad by a southwardly curve.

The purpose of this suit, as heretofore said, is to enjoin the Louisville & Nashville Railroad Company, when bringing live stock to the city of Louisville, from delivering the same at its live stock depot at the Bourbon Stock Yards, and to require that the Louisville & Nashville Railroad Company shall, whenever the shipper so desires, deliver such stock to the Southern Railway for delivery at the Central Stock Yards.

If this live stock comes into the city of Louisville from the east over the Louisville & Nashville Railroad Company's tracks, it would, according to the usual course of business, be delivered immediately to the Bourbon Stock Yards; but if the company is required, at the demand of the shipper, to deliver this stock to the Southern Railway for the Central Stock Yards, it would have to be taken from East Louisville in a southwesterly direction to South Louisville at the point A, and then taken from South Louisville northwardly over the Louisville & Nashville's main tracks to the point C, at Magnolia Avenue, and there delivered to the Southern Railway, which would then carry the stock westwardly along Magnolia Avenue from the point C to the point E, where it would make connection with the main line of the Southern Railway, and from which point it would be carried in a southeasterly direction by the Southern Railway to the Central Stock Yards at the point G.

On the other hand, if the live stock should come from the south it would first reach Louisville at the point A in South Louisville. At this point, according to the regular course of handling the business, all the live stock cars would be taken by one engine from the point A in a northeasterly direction to the Bourbon Stock Yards at point H. But if required to deliver to the Southern Railway for delivery at the Central Stock Yards, then the live stock cars destined for the Central Stock Yards would at South Louisville have to be separated from the cars destined for the Bourbon Stock Yards; then those destined for the Bourbon Stock Yards would be carried by one engine, as heretofore indicated, to those yards, while those destined for the Central Stock Yards would be carried by another engine over the main tracks of the Louisville & Nashville, running from A northwardly to the Magnolia Avenue connection with the Southern Rail-

way at the point C; thence westwardly by a Southern Railway engine over the Southern Railway along Magnolia Avenue to the point E; thence southeastwardly over the Southern Railway to the Central Stock Yards at the point G. Such is the most direct course which could be taken for live stock destined for the Central Stock Yards. But as a practical matter, as heretofore explained, the switch engines which carry freight from South Louisville northwardly over the main tracks of the Louisville & Nashville Railroad Company do not make any stops between South Louisville and the distributing yards at Kentucky Street, which is about a mile north of Magnolia Avenue; and from the Kentucky Street yards cars are distributed by another switch engine: so that practically the way these live stock cars would be handled, if delivered to the Southern Railway, would be to carry them from South Louisville at the point A to the Kentucky Street yards at the point D, where they would then be taken by another switch engine and brought back southwardly from the point D to the point C at Magnolia Avenue, where they would be delivered to the Southern Railway, and thence pursue the course heretofore indicated.

The distance from South Louisville (point A) to the Bourbon Stock Yards (point H) is 3.94 miles. The distance from South Louisville (point A) to the Central Stock Yards via the L. & N. to Magnolia Avenue, thence via Southern Railway to Central Stock Yards, is 3.81 miles (the distance from South Louisville to Seventh and Magnolia Avenue connection being 1.71 miles, and the distance from the Seventh and Magnolia Avenue connection to the Central Stock Yards, passing through the point E, being 2.1 miles). See affidavit of Hines, Rec. 54.

We have made the foregoing explanation of the local situation because we thought the court would be thereby assisted

in understanding the record. But, after all, the case is narrowed down to the simple question of whether the Louisville & Nashville Railroad Company, in bringing live stock to the city of Louisville can insist on delivering the same only at *its live stock depot in that city*, or whether it can be compelled at the demand of the shipper to refrain from delivering the live stock at its own depot and can be required to turn the cars containing the same over to the Southern Railway at a distant point in the city, where there happens to be a physical connection between the two tracks, to be thence delivered to *the depot of the Southern Railway*.

The suit is brought by the Central Stock Yards Company as sole plaintiff. This company acts as the agent of the Southern Railway for loading and unloading live stock brought to its yards; and also furnishes pens and other accommodations for such live stock, as a hotel-keeper furnishes accommodations for human beings, and as a livery stable keeper furnishes accommodations for horses and mules. As a result of this situation buyers and sellers of stock come to such a place to buy and sell. The Central Stock Yards Company is itself not the owner of any stock. It has never offered to ship any stock over the Louisville & Nashville Railroad. It has never been either the consignor or consignee of any stock. Its complaint is that, if live stock should be brought to its yards, it would get the compensation of fifty cents a car from the Southern Railway for unloading it; and, if kept at its yards by the owner or consignee, it would get a chance to feed the stock, so long as kept there, and would make a profit out of the feed, and also out of the charge for keeping; but that the Louisville & Nashville Railroad Company, by its refusal to deliver live stock to the South-

ern Railway for delivery at the Central Stock Yards, cuts the Central Stock Yards out of this character of profit. Therefore it insists that it has a right to an injunction against the Louisville & Nashville Railroad Company to compel the Company to do what complainant says the shippers and owners of live stock want the Company to do, and which if done would result indirectly in the benefit to the complainant above explained, just as delivering passengers near a hotel would result probably in increased business to that hotel, whereas a delivery of passengers two or three miles away from the hotel would take from it a large part of such business. One of the questions arising in this case is as to whether or not the Central Stock Yards Company, which keeps a hotel for live stock, can enjoin a railroad company from disobeying and disregarding what the hotel-keeper says are the wishes and desires of the owners and shippers of the stock.

The case having been heard in the lower court on a motion for a preliminary injunction, that court reached the conclusion that it did not have jurisdiction of the case, because it was of opinion that the complainant certainly did not have a right at common law to the relief prayed for, and that if it had any right at all in the matter it was under the Interstate Commerce Act, as *a new right created by that act;* but that, as that act expressly provided remedies for a violation of its provisions, to wit, either a suit for damages or an application for relief to the Interstate Commerce Commission, therefore the remedies thus provided by the act for the violation of a right created by the act, were exclusive; and that the complainant could not maintain this suit in equity, and was therefore not entitled to the injunction asked for. The court was also of the opinion that even if this jurisdictional question should be passed, the right to relief upon the merits was

so uncertain that it should not be determined on a motion for a preliminary injunction, but should wait for final hearing. Accordingly the court overruled the motion for a preliminary injunction. (The opinion is found in this record beginning at page 59, and is reported in 112 Fed. Rep. 823).

Subsequent, however, to the delivery of this opinion a final decree was entered dismissing the bill on the ground of want of jurisdiction, and without prejudice to complainant's right to pursue other remedies it might have upon the matters alleged by it. And from that decree of dismissal an appeal was taken to the Circuit Court of Appeals.

In the Circuit Court of Appeals the first question was, of course, that of jurisdiction; but it was evident that even if the court should conclude that it had jurisdiction, yet if it should further conclude that the decree dismissing the bill was right on any other ground, either because the complainant has no legal interest in the controversy which will justify the maintenance of the suit, or because the position of the defendant is correct as to its rights and duties in the premises, the court would not reverse the decree, but would affirm it. It is true, the case in the Circuit Court had only been prepared on the motion for a preliminary injunction, but it had been very fully prepared on this motion, and, as this court has held in the case of Smith vs. Vulcan Iron Works, 165 U. S. 518, that on an appeal to the Circuit Court of Appeals from an order granting a preliminary injunction the Circuit Court of Appeals might consider and decide the merits of the case and order a dismissal of the bill, it would seem necessarily to follow that on an appeal from a decree dismissing the bill, even though the case had been prepared only on a motion for a preliminary injunction, the Circuit Court of Appeals, if it thought the bill had been properly dismissed on the merits of the case, could so hold and therefore affirm the decree.

This view of the law was adopted by both sides in the Circuit Court of Appeals, and the case accordingly was briefed elaborately on the merits, and on the right of complainant to sue, as well as upon the question of jurisdiction.

The Circuit Court of Appeals decided the case upon the merits, holding, in an opinion by Judge Day, now Mr. Justice Day, that the complainant was not entitled to the relief sought, and therefore affirmed the decree of the Circuit Court dismissing the bill. The opinion of the Circuit Court of Appeals will be found in this record beginning at page 70, and is reported in 118 Fed. 113.

From the decree of affirmance by the Circuit Court of Appeals an appeal has been taken to this court.

I.

JURISDICTION.

The exact proposition which the Circuit Court decided, on the question of jurisdiction was that the right asserted by complainant did not exist at common law; that if it existed at all (upon which the court expressed no decided opinion) it was a right created by the Interstate Commerce Act; and that as the Interstate Commerce Act itself provides remedies for the enforcement of its provisions, including the enforcement of any rights newly created by it, therefore these remedies thus provided by the act itself are exclusive; and as the remedies thus provided by the act, so far as they relate to complaints by individuals, are either an action at common law for damages or a complaint before the Interstate Commerce Commission, therefore complainant has no right to maintain a suit in equity for an injunction to restrain the violation of the rights asserted in its bill of complaint herein,

which rights, as above said, are rights not existing at common law but existing, if at all, solely by virtue of the provisions of the Interstate Commerce Act.

As to whether or not the rights insisted upon by complainant are of a character which did exist at common law, we will not stop now to consider at length, but will consider more elaborately in a later part of the brief, where we shall consider the entire question of the nature of the rights claimed, both upon common law principles and under the provisions of the Interstate Commerce Act. But, assuming now for the purpose of argument that the rights thus insisted upon by complainant did not exist at common law, and that if they exist at all it is only by virtue of the Interstate Commerce Act, we submit the following considerations in support of the conclusion of the Circuit Court.

It has long been a recognized principle of statutory construction that where a statute gives a new remedy for a pre-existing right, the new remedy will not be considered to be exclusive of pre-existing remedies, but only as cumulative thereto; but that when a statute creates a new right, and at the same time specifies a particular remedy for the vindication of that right, this remedy will be considered to be exclusive of all others, unless words are expressly used to the contrary. Furthermore, it may sometimes be true that a statute is in part merely declaratory of the common law, thus merely recognizing pre-existing rights, but is also in part creative in character, giving rise to new rights which did not previously exist. And in such a case the common law remedies will be applicable for the enforcement of the pre-existing common law rights, although a remedy be pointed out in the statute; but for the new right created for the first time by the statute, the remedy pointed out by the statute will be accepted as the exclusive remedy for the vindication of the same.

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In Stafford vs. Ingersoll, 3 Hill, 39, the court said :

"When a statute merely gives a new remedy, without "any negative expressed or implied, the old remedy is "not taken away, and the party may have his election "between the two. (Citing authorities) . . . So where a "statute *creates* a right which did not exist before, and "prescribes the remedy for a violation of it, *that remedy* "*must be pursued.* Almy vs. Harris, 5 Johnson, 175. "But the statute under consideration does little more than "declare that the injured party may in certain cases have "his damages appraised by the fence viewers; and I am "not aware of any rule of interpretation upon which this "can be made to take away the remedy that before "existed at the common law.

"It may be that the statute has *in some cases* given a "remedy against the owner of the adjoining close *where* "*none existed at the common law. In cases of that* "*description the statute remedy must be pursued.* But "where there was an action at the common law, that "remedy still exists." (Our italics.)

The case just cited was expressly approved by this Court in the case of Farmers, etc., National Bank vs. Dearing, 91 U. S. 35, where the court said :

"Where a statute creates a new offense and denounces "the penalty, or gives a new right and declares the "remedy, the punishment or the remedy can be only that "which the statute prescribes. Stafford vs. Ingersoll, 3 "Hill, 38; First National Bank of Whitehall vs. Lamb, "57 Barb. 429."

To the same effect see Fourth National Bank vs. Francklyn, 120 U. S. 747, and Barnett vs. National Bank, 98 U. S. 555, 558.

These authorities seem to us sufficient to conclude the question as to the proposition of law here announced. It was suggested in argument in the lower court that the statutory remedies thus pointed out will be taken as exclusive only when they are adequate, leaving to the court to determine whether or not they are adequate. This seems to us a misconception of the rule. The rule is one of statutory construction. In other words, the court considers that the Legislature, when creating a new right, and pointing out a specific remedy for its vindication, has determined, as a matter of legislative determination, that the remedy thus pointed out *is adequate* and is to be the exclusive remedy for the vindication of the newly created right. To leave the court in every instance to determine for itself whether or not the remedy provided by the statute is adequate, and to leave a court of equity to supply other remedies if it thinks those given by the statute are inadequate, would practically abolish the rule, and would leave the court of equity full power to give remedies according to the principles upon which it acts when not controlled at all by statute, to wit, the principle of providing a remedy whenever in its judgment the common law remedies are not adequate.

Counsel for appellant strongly rely on Section 22 of the Interstate Commerce Act, which contains the following language:

"Nothing in this act contained shall in any way "abridge or alter the remedies now existing at common "law or by statute, but the provisions of this act are in "addition to such remedies." (1 Sup. to U. S. Rev. Stats., p. 691.)

But in construing this language it must be remembered that unquestionably the Interstate Commerce Act is largely declaratory of the common law. Thus many contracts and actions on the part of common carriers making unjust or unreasonable discriminations, or charging unjust or unreasonable rates for service, were unlawful at the common law. The invalidity of such contracts or of such actions is recognized and denounced by the Interstate Commerce Act. There were, at the passage of the Interstate Commerce Act, remedies "existing at common law or by statute" for the vindication of rights violated by such contracts or actions as above indicated. And while the Interstate Commerce Act does expressly point out remedies which may be used in vindication of such rights, yet the statutory remedies thus indicated are not exclusive of the previously existing statutory or common law remedies; and we submit that it is to such cases that the language of the act above quoted refers. It would hardly seem appropriate to refer to *remedies previously existing*, either at common law or by statute, for *rights* which did *not* previously exist, and which are created for the first time by the Interstate Commerce Act itself. Inasmuch as the Interstate Commerce Act does simply declare the previously existing law as to some rights, and does create for the first time other rights, and does provide that the remedies pointed out by it shall not be deemed exclusive of remedies then existing, the reasonable inference is that as to those rights which previously existed, the remedies previously existing, as well as those pointed out by the act, should continue; but that the language above quoted, referring to pre-existing remedies, should not be applied to rights which did not previously exist, but were created for the first time by the act itself.

We think we can truly say that the question here discussed is an open question so far as any special consideration

and determination of it have heretofore been had. The most that can be said on the side of complainant is that some cases have been decided in which the question *might have been* raised and decided, but in which it was not raised or decided. It is true that in the case of Little Rock R. Co. vs. East Tennessee, etc., R. Co., 47 Fed. 774, decided by Judge Hammond, he expressed the opinion that the remedies granted by the Interstate Commerce Act are not exclusive; but he also says in his opinion that it is not necessary to decide that question. He furthermore says that Judge Jackson had previously decided the question in the same way as indicated by himself in K. & I. Bridge Co. vs. L. & N. R. Co., 37 Fed. 567. But a remarkable thing about this matter is that when we examine the case just cited, and which Judge Jackson decided, we find that the procedure adopted in that case was precisely the procedure which the Circuit Court in the case at bar held ought to have been adopted, to wit, an application first to the Interstate Commerce Commission, and then an application to the court to enforce the order of the Commission.

It is next insisted that the late act of Congress, approved February 25, 1903, known as the Elkins Act (Supplement of 1903 to U. S. Compiled Statutes, page 363), gives the Circuit Court jurisdiction in the first instance of a case of this kind, without the necessity of a preceding application to the Interstate Commerce Commission, even if such jurisdiction did not previously exist; and that the decision of this court in Missouri Pacific Railroad Co. vs. United States, 189 U. S. 274 shows that this can be taken advantage of in the case at bar.

We can not see anything in the Elkins Act that gives the jurisdiction insisted upon, if it did not previously exist. The *first section* of that act relates wholly to the matter of crimi-

nal prosecution. The *second section* bears simply upon the question of parties, and provides that in any proceeding for the enforcement of the provisions of the statutes relating to Interstate Commerce, all persons interested in or affected by the orders or decrees sought, may be made parties to the proceeding. The *third section* of the act relates solely to proceedings or investigations instituted either by the Interstate Commerce Commision or by the Attorney General of the United States. The *fourth section* of the act simply repeals all acts and parts of acts in conflict with it, and provides that such repeal shall not affect pending suits, but that such causes shall be prosecuted to a conclusion and such rights enforced in a manner "heretofore provided by law and as modified by the provisions of this act." The *fifth section*, which is the last, simply provides that the act shall take effect from its passage. We repeat, therefore, that, if prior to the adoption of the Elkins Act the jurisdiction in equity of the Circuit Court, under such a state of case as is now presented, did not exist, we can see nothing in the Elkins Act which creates it.

As to the opinion of this court in Missouri Pacific R. Co. vs. United States, *supra*, it seems to us to be an authority against the appellant rather than in its favor. That was a suit instituted by the United States against the Missouri Pacific Railway for an alleged discrimination contrary to the provisions of the Interstate Commerce Act, and without any previous investigation or determination by the Interstate Commerce Commission. It was insisted in the Circuit Court by the defendant that the remedies provided by the Interstate Commerce Act were exclusive of all others, and that the act did not authorize the United States to bring such a suit in equity without previous action by the Interstate Commerce Commission. The Circuit Court held that the

United States had a right to maintain the suit; and therefore took jurisdiction and decided the case upon its merits. This court held that the judgment of the Circuit Court was erroneous; and that the United States was not authorized, as the law existed at the time the degree was entered, to maintain such a suit. This necessitated a reversal of the decree; and it was reversed; but inasmuch as the decree had to be reversed, and inasmuch as the Elkins Act expressly conferred the power to maintain such a suit as the one there under consideration, therefore the court held that the case should be remanded with directions to take such further proceedings as should be consistent with that act.

Thus it will be observed that in that case this court held that the decree of the Circuit Court was erroneous *at the time it was rendered*; and therefore it was reversed; and the action being thus reinstated in the Circuit Court, the court held that further proceedings should be in accordance with the Elkins Act, inasmuch as it expressly provided that it should apply to pending proceedings. But in the case at bar appellant asks the court to do a very different thing. It asks the court, even it it should conclude that the decree of the Circuit Court was *correct when it was rendered*, under the law as then existing, still to reverse that decree, because, as complainant insists, the law has since been changed. This we are sure the court could not do, if the law had been changed; though, as said above, we are sure it has not been changed so as to cover such a case as is presented in the present record.

So far as the opinion under consideration has any bearing upon the case at bar it seems to us to be decidedly in favor of the appellee, for it holds that, as the right to maintain the suit therein sought to be maintained was not given by the Interstate Commerce Act, therefore the suit could not be

maintained. And, while it held that that particular right, to wit, the right of the United States to sue in equity, was given by the Elkins Act, yet it did not intimate, and it is not true, that the Elkins Act gives to an individual the right to maintain such a suit as the appellant seeks to maintain in the case at bar.

In the case of acts claimed to be in violation of the Sherman Anti-Trust Act of July, 1890 (1 Sup. to U. S. Revised Statutes, p. 762), it has been expressly decided in a number of cases, without dissent so far as we know, that the remedies pointed out by that statute are exclusive of all others; and therefore that, however much an individual may be damaged by the monopolies, etc., prohibited by that statute, he has no right to the remedy by injunction, but can only proceed at law for damages. It is very difficult to understand why the remedies pointed out by that statute should be deemed exclusive, and those pointed out by the Interstate Commerce Statute should not be so deemed as to rights created by the latter statute. For cases holding the remedies created by the Sherman Anti-Trust Act to be exclusive see Pidcock vs. Harrington, 64 Fed. 821; Gulf, etc., R. Co. vs. Miami Steamship Co. 86 Fed. 407, 420; South Indiana Express Co. vs. U. S. Express Co. 88 Fed. 659, 663.

We submit, therefore, in conclusion that if the rights asserted by complainant in this suit do not exist upon common law principles, and if is compelled to rely upon the Interstate Commerce Act for the creation of such rights, then it has no right to enforce the same by a statute in equity, until it shall first have applied to the Interstate Commerce Commission and gotten an order to the effect desired from that commission.

II.

Complainant Not the Party in Interest.

Passing beyond the question of jurisdiction, the question arises on this record as to whether or not the Central Stock Yards Company is the proper person to make complaint of the alleged violations of law by the Louisville & Nashville Railroad Company which are referred to in the bill of complaint.

The complaint is not that the Louisville & Nashville Railroad Company has violated any contract for the shipment of live stock, but it is simply that the law requires (according to the complainant's construction of it) that the Louisville & Nashville Railroad Company should receive live stock from persons who may desire to ship it, and should consent to carry the same and deliver it to the Southern Railway Company for delivery at the Central Stock Yards. It is alleged that the Louisville & Nashville Railroad Company has refused to receive any stock which persons desire to ship to the station at Central Stock Yards, Kentucky, an alleged point on the line of the Southern Railway. If so, who has been wronged thereby in any legal sense?

There is no contract of any kind between the Louisville & Nashville Railroad Company and the Central Stock Yards Company; and therefore it can not be claimed by the Central Stock Yards Company that the Louisville & Nashville Railroad Company has violated any contract obligation to it. Again, the Central Stock Yards Company is not the owner of any cattle, and has not offered to ship any cattle over the L. & N. Railroad. It therefore can not complain that its rights as a shipper have been in any sense violated. Further-

more, it is not even alleged that any owner of live stock has ever attempted to ship live stock to the Central Stock Yards Company *as a consignee.* There are many allegations about the desire and the offer of shippers to ship live stock to the Central Stock Yards as *a place of destination.* A perfectly familiar rule of pleading is that a pleading should be construed most strongly against the pleader, and whether we apply that rule of pleading or whether we simply construe the pleading reasonably, it does not amount to a complaint that the owners of live stock have endeavored to ship the same to the Central Stock Yards Company *as consignee* thereof, but only that they have desired or attempted to ship it to the Central Stock Yards *as a place of destination.*

Thus take the general charge in paragraph seven of the bill of complaint as follows:

> "Plaintiff says the Louisville & Nashville Railroad "Company has announced its intention and purpose to "refuse to receive, bill, transport, transfer, switch or "deliver any live stock—the shipment of which originates "outside of the State of Kentucky—consigned or tendered "to be consigned to any point of physical connection be- "tween the said line and the lines of the Southern Rail- "way Company in Kentucky destined to the Central "Stock Yards Station, Ky., or to the Central Stock Yards, "Kentucky, or any such live stock consigned to any "individual, partnership, firm or corporation at said "Central Stock Yards, Ky., or at said Central Stock "Yards Station, Ky., or via the Southern Railway Com- "pany in Kentucky destined to said yard or station . . . "Although during said time from day to day live stock "shipments originating out of the State of Kentucky "have been tendered defendant from connecting lines and

"other common carriers and shippers, consigned to said "Central Stock Yards, Ky., and to said Central Stock "Yards, Ky., and to individuals, firms, partnerships and "corporations at said Central Stock Yards, Ky., and at "said Central Stock Yards, Ky., and to said stock yards "and station via the Southern Railway Company in "Kentucky." (Rec. 4 and 5.)

Or again, take the one specific case charged in the bill of complaint, to wit, the case of the stock of Allen Bros. The language of the bill of complaint as to this stock is:

"That before receiving and billing said carload of "stock, said Allen Bros. demanded of the Louisville & "Nashville Railroad Company that said company receive, "bill, transport, transfer switch and deliver the said car- "load of cattle to the Southern Railway Company, at "Louisville, Kentucky, at one of the points of physical "connection between the tracks of the Southern Railway "Company and the tracks of the defendant, the Louisville "& Nashville Railroad Company, for delivery by the "Southern Railway Company *at* Central Stock Yards, "Central Stock Yards Station, Ky., care of Hart, McCamp- "bell & Company; but the defendant, the Louisville "& Nashville Railroad Company, neglected, failed and "refused to so bill the said stock and would not bill same "otherwise than as stated, that is, to the said Allen Bros., "care of Hart, McCampbell & Company in Louisville, "Ky." (Rec., p. 7.)

We repeat, therefore, that the only fair interpretation of the bill of complaint, taking it altogether, is that the Central Stock Yards Company simply complains that the Louisville

& Nashville Railroad Company will not receive stock destined to the Central Stock Yards, as a *place of destination.* If there be anywhere in the long bill of complaint an expression which might seem to indicate that some shipper has desired to ship to the Central Stock Yards Company as consignee, such expression would be governed by what is the manifest meaning of the bill of complaint as a whole. Thus in the case of Prescott, etc., R. Co. vs. Atchison, etc., R. Co., 73 Fed. Rep. 439, the court said:

> "Now, it is true that the complaint contains a single "clause, at the close of the sixty-ninth paragraph, which "uses the words 'by utterly refusing to receive or deliver "freight or passengers to or from it.' That language "taken in its full scope imports a refusal to receive "freight that had its origin on the line of the Prescott & "Arizona Central Railroad Company, wherever and "under whatever circumstances it was tendered. But it "is a fair rule of pleading that the complaint is to be "interpreted, even upon demurrer and upon motion to "dismiss, as a whole."

And accordingly the court held that although this general allegation did occur at one point in the bill, yet it was manifest that the real complaint was the refusal to interchange freight and passengers on through bills and through tickets, and not the absolute refusal to receive or deliver freight or passengers under any circumstances.

In other words, examining the entire situation, we find that the Central Stock Yards Company is simply a corporation, organized for profit, which proposes to keep a place of accommodation for live stock, where people can send their stock for safe-keeping, and where the same can be bought

and sold by persons desiring to deal in live stock. And therefore the Central Stock Yards Company, although not itself the owner of any live stock, and neither the consignor nor the consignee of any shipment of live stock, and without having any contract with the Louisville & Nashville Railroad Company on the subject of transportation and delivery of live stock, simply complains that various persons desire to send live stock to the complainant's yards, and that if the defendant would comply with this request and desire of the owners of stock, the result would be that complainant would make a profit out of the keeping of such live stock.

We submit that this does not give any cause of action to the Central Stock Yards Company, any more than a hotel-keeper who might have a hotel at a certain point in a city near a railroad would have a right to complain that passengers would like to alight near his hotel, in which event they would likely come to him as guests, but that the railroad company by refusing to stop near his hotel, or to discharge passengers near his hotel, deprives him of the trade which would come to him if such stoppage or discharge should be made.

Or, to take another illustration, suppose I direct an agent of mine to go to a certain store and buy a bill of goods. Instead of the agent going, as directed by me, to the store of John Smith to buy the goods, he goes to the store of Tom Jones and buys the goods. The result is that instead of John Smith making a profit from the sale, as I expected and desired, Tom Jones makes the profit. Would this give John Smith, who has thus missed the profit, any cause of action against the agent who bought the goods at the other place, contrary to the directions of his principal? Clearly it would not, and yet John Smith has missed the profit which he would have made if my agent had obeyed my instructions, as he ought to have done.

Concede for the purpose of argument that it is the duty of the Louisville & Nashville Railroad Company to receive from the owners and shippers of live stock in Tennessee such live stock as they may desire to send to the Central Stock Yards, and concede for the sake of argument that it violates its duty as a common carrier in refusing to receive such live stock and send it by the Southern Railway to the Central Stock Yards, and concede, further, for the purpose of argument, that if the company would perform its duty and send the stock to the Central Stock Yards, the owner of the Central Stock Yards would make a profit from the keeping of such stock; and yet we submit that this does not establish any duty on the part of the Louisville & Nashville Railroad Company *to the Central Stock Yards Company*, as the owner of this live stock hotel, the breach of which will give a cause of action to the Central Stock Yards Company.

Counsel refer to certain stock yards cases where they say that relief was either granted or refused to the stock yards company, but without this particular point being considered as an obstacle to the relief prayed.

One of these cases is Covington Stock Yards Co. vs. Keith, 139 U. S. 128, to which we will hereafter refer more at length, where the court gave certain relief to Keith as the owner of certain stock yards. But an examination of the statement of facts in the opinion of Mr. Justice Harlan in that case shows that Keith was *himself engaged in buying and selling live stock*, not only as commission merchant but on his own account. So that he was not simply the owner of a stock yards which desired to keep live stock for the profit there was in keeping them for others; and he stated in his bill that he "was provided with all the necessary means of receiving, feeding and caring *for such stock as he pur-*

chased, or as might be consigned to him by others for sale," but that the railroad company would not deliver the stock to him. (Page 129.)

Another case relied on by appellant is Interstate Stock Yards Co. vs. Indianapolis Union Railroad Co, 99 Fed. Rep. 472. But the gist of the complaint and the prayer in that case is shown in the following sentence from the opinion of Judge Baker, to wit:

> "It (complainant) simply asks that live stock consigned "to it, or to persons doing business in its yards, or con- "tracted in the bill of lading to be unloaded, fed, watered "and rested there, should be *delivered in accordance with* "*the contract.*" (Page 483.)

There is no allegation anywhere in the bill of complaint in the case at bar that the Louisville & Nashville Railroad Company has failed or refused to deliver to the Central Stock Yards any live stock which it has contracted to deliver there.

The other case referred to is Butchers, &c., Stock Yards Co. vs. L. & N. R. Co., 67 Fed. Rep. 35, a case in which the complaint of the Butchers & Drovers Stock Yards Company, in a case almost exactly like the case at bar, was dismissed on its merits. It is true that it was not dismissed on the ground we are now considering, and no mention was made of such a ground. But the statement of the case in the opinion does not enable us to tell what was the showing of the Stock Yards Company as to the nature of its interest in the controversy, or as the foundation for its right to complain of the failure of the Louisville & Nashville Railroad Company to deliver stock at its stock yards. The most that can be said of this case is that if the point which we are now considering could have been raised in the case, it was not thus raised.

We submit, therefore, that the Central Stock Yards Company has exhibited no right to maintain this complaint on account of the refusal of the Louisville & Nashville Railroad Company to receive stock destined for the Central Stock Yards, whether any one else would have the right to make the complaint or not.

III.

Delivery At Destination.

Passing now beyond the question of jurisdiction, and beyond the question as to whether the Central Stockyard's Company has shown itself to have any legal interest in the controversy, and supposing both those propositions to have been decided in favor of appellant, we come to the real merits of the case, to consider whether or not it is shown that the Louisville & Nashville Railroad Company has violated any right of anybody.

In the brief of counsel for appellant, they treat this case entirely as if it were one involving "connecting carriers," and as to the duty of one carrier to receive freight at a point on its line destined to a point on the line of a connecting carrier. In other words, the case is treated as if it involved the question, for example as to whether or not the Louisville & Nashville Railroad Company is required to receive freight at Nashville destined to some point, such as Shelbyville or Lexington, on the Southern Railway beyond Louisville, and which is routed by the shipper from Nashville to Louisville by the Louisville & Nashville Railroad Company, and then from Louisville to Shelbyville or Lexington by the Southern Railway. Accordingly counsell give extended consideration to authorities bearing upon the question of the duties of com-

mon carriers in the matter of *forwarding* freight through the instrumentality of connecting carriers.

We will at the proper place consider these arguments and authorities, made and cited by appellant; but we earnestly insist that the case at bar does not legitimately present the questions just suggested. It is really not a case involving the duty of a common carrier to forward freight beyond its line to a point of destination on the line of a connecting carrier. But it is a case which involves the duty of a common carrier in the matter of *delivery* of freight when it *has reached its destination.*

All of the argument on the subject of delivering to connecting carriers, and forwarding by connecting carriers to destination, is based on the idea that Central Stock Yards, Ky., is an altogether different place from Louisville, Ky., and that a shipment to Central Stock Yards, Ky., should be treated as if it were a shipment from Nashville to Lexington via Louisville. But our statement of the facts of this case shows that this is not the real truth of the situation. Central Stock Yards, Ky., is no more a distinct place from Louisville than Bourbon Stock Yards, Ky., is a distinct place from Louisville.

Real substantial facts can not be created by the mere use of words. And the addition of the word "station" after Central Stock Yards, or the creation of an alleged station on the line of the Southern Railway at the Central Stock Yards, can not alter the substantial fact that Central Stock Yards are simply stock yards designed to accommodate the Louisville market for live stock, precisely as in the case of the Bourbon Stock Yards; and that the Central Stock Yards are simply the live stock depot of the *Southern Railway for the city of Louisville*, precisely as the Bourbon Stock Yards are the live stock depot of the *Louisville & Nashville Railroad*

Company for the city of Louisville. The contract between the Central Stock Yards Company and the Southern Railway Company, introduced in evidence by the complainant, distinctly shows by the fourth section thereof that these stock yards are made the live stock depot of the Southern Railway for the city of Louisville (Rec., pp. 41 and 42), and Mr. Powell so states in his affidavit (Rec. 25.) And the fact that it may be situated a few feet or yards outside of the city boundary, so as to avoid the payment of city taxes, can not alter the real situation. A delivery of live stock to the Central Stock Yards is in every legitimate sense (if substance be regarded rather than form) *a Louisville delivery*, as fully and completely as a delivery to the Bourbon Stock Yards is a Louisville delivery.

We repeat, therefore, that the question involved in this case is really as to *what character of delivery* the Louisville & Nashville Railroad Company can be compelled to make *in Louisville*, and not as to what may be its duty as to *forwarding* cattle by means of connecting carriers to *points beyond Louisville.* In other words, it is really a question of delivery and not a question of forwarding.

Then treating the case as it really is, we come to the question as to whether the Louisville & Nashville Railroad Company in bringing live stock to Louisville has a right to establish a live stock depot in Louisville and insist on delivering all live stock at that depot, or whether it can be compelled to make such deliveries at other points in the city.

It seems to us that this question is practically settled by the opinion of this court in the case of Covington Stock Yards Company vs. Keith, 139 U. S. 128, and it was so considered by the Circuit Court of Appeals, not only in the case at bar but also in a case which went to that court some years ago from Nashville, to wit, Butchers & Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed. 35.

In Covington Stock Yards Co. vs. Keith, *supra*, it appeared that the Kentucky Central Railroad ran through the city of Covington. The railroad company had by an agreement with the Covington Stock Yards Company made the yards of that company the live stock depot of the railroad company and agreed to deliver all live stock at those yards. Near the Covington Stock Yards, and connected also with the line of the railroad, were the stock yards of one Keith who was engaged in buying and selling live stock both on his own account and on commission. The stock yards of Keith, as just stated, were on the line of railroad, and platforms had for some time been in existence by means of which live stock could be received into those yards directly from the cars of the railroad company and likewise delivered into the cars of the railroad company directly from those yards. The railroad company being in the hands of a receiver this receiver tore up the platform which was necessary for the receipt and delivery of stock between the cars of the company and the yards of Keith; and required Keith to receive and deliver all of his live stock through the yards of the Covington Stock Yards Company. But this was not all. Keith *was required to pay for the privilege of receiving or delivering* his stock through the Covington Stock Yards. Under these conditions Keith filed an intervening petition in the suit in which the receiver of the Kentucky Central Railroad Company had been appointed, and asked for a rule against the receiver to show cause why this live stock should not be delivered to him or received from him at some place other than the Covington Stock Yards.

The substance and effect of the ruling, both of the Circuit Court and of this court, were that the railroad company had a perfect right to establish the Covington Stock

Yards as its live stock depot, by means of a contract between it and the Stock Yards Company to that effect; and that, if it did so, it had the right to receive and deliver all live stock at that depot; that it could not be compelled to receive and deliver live stock at every stock yards that might be established along its line in the city of Covington; but that receipt and delivery of live stock was a part of the transportation thereof, and that the railroad company could not require a shipper or consignee to pay for the receipt or delivery of live stock, or for the use of the live stock depot for that purpose, in addition to the charge for transportation, any more than the railroad company could charge passengers for the use of a passenger depot, or charge ordinary shippers of dead freight for the use of a freight depot, in addition to the charge of transportation. Accordingly this court affirmed the judgment of the circuit court, which in effect had decreed that the receiver should receive and deliver live stock from and to Keith through the Covington Stock Yards *free of any charge* for passing through the same; and that if the stock yards company should refuse to allow this, then that the receiver should put back the platforms necessary to make direct deliveries from the cars of the company to the stock yards of Keith and *vice versa*, and should there receive and deliver all live stock from or to Keith.

In the course of its opinion this court said:

"When animals are offered to a carrier of live stock to "be transported, it is its duty to receive them; and that "duty can not be efficiently discharged, at least in a town "or city, without the aid of yards in which the stock "offered for shipment can be received and handled with "safety and without inconvenience to the public while "being loaded upon the cars in which they are to be

"transported. So, when live stock reach the place to "which they are consigned, it is the duty of the carrier to "deliver them to the consignee; and such delivery can "not be safely or effectively made except in or through "enclosed yards or lots, convenient to the place of unload- "ing; in other words, the duty to receive, transport and "deliver live stock will not be fully discharged, unless "the carrier makes such provision, at the place of load- "ing, as will enable it to properly receive and load the "stock, and such provision, at the place of unloading, as "will enable it to properly deliver the stock to the con- "signee.") P. 134.)

Then after holding that receipt and delivery are a part of transportation, and that the carrier, therefore could not make a charge for receipt or delivery over and above the charge for transportation, the court then concludes as follows:

"We must not be understood as holding that the rail- "road company in this case, was under any legal obliga- "tion to furnish or cause to be furnished, suitable and "convenient appliances for receiving and delivering live "stock at every point on its line in the city of Covington "where persons engaged in buying, selling or shipping "live stock, chose to establish stock yards. In respect to "the mere loading and unloading of live stock, it is only "required by the nature of its employment, to furnish "such facilities as are reasonably sufficient for the busi- "ness at that city. So far as the record discloses, the "yards maintained by the appellants are, for the purpose "just stated, equal to all the needs at that city, of ship- "pers and consignees of live stock; and *if the appellee "had been permitted to use them, without extra charge for*

"*mere yardage, they would have been without just ground* "*of complaint in that regard*; for it did not concern them "whether the railroad company itself maintained stock "yards, or employed another company or corporation to "supply the facilities for receiving and delivering live "stock it was under obligation to the public to furnish." (P. 136.)

And accordingly the court affirmed the judgment of the Circuit Court, which, as heretofore said, had in effect provided that if the railroad company should receive and deliver Keith's live stock through the Covington Stock Yards (its live stock depot) without charge to Keith, then it should not be required to receive or deliver from or to him at his own yards; but that unless the railroad company would receive and deliver from and to him, free of charge, at the Covington Stock Yards, then it must do so at Keith's own stock yards. Thus this court in that case distinctly settled the proposition that a live stock depot for a railroad company handling live stock is absolutely essential for such a locality, for example as the city of Covington; but that, if the railroad company establishes a depot, whether by erecting the necessary appliances itself, or by making a contract with some other corporation owning stock yards, it can then lawfully insist upon receiving and delivering all the live stock of that market at that depot, and can not be required to make deliveries elsewhere.

An attempt is made to distinguish that case from the case at bar by saying that in the Keith case the court was simply speaking of the actual duty of loading and unloading, in the sense of driving the cattle out of the car, or into the car, as distinguished from a mere delivery in car load lots in the car. But that was not the point in the Keith case; Keith had

already established his own facilities for receiving and delivering, such as yards and pens and chutes; and the controversy between the parties in that case was not over the question as to who should drive the cattle out of the car into the pen, or out of the pen into the car, but it was as to whether or not Keith could require the railroad company to deliver car loads of cattle at his stock pens, where he could take them out free of expense, or whether the railroad company could insist upon delivering and receiving all his stock at the yards of the Covington Stock Yards Company, and could charge him for the use of such conveniences over and above the charge for transportation. Of course, Keith would greatly have preferred that the live stock should be received from him or delivered to him at his own yards, rather than at the yards of the Covington Stock Yards Company; but this court held that if the railroad company and the stock yards company, under their joint arrangement, would permit the stock of Keith to be received and delivered *without charge* through the stock yards of that company, this was *all he could demand;* or, in other words, to use the language of this court, that if this had been permitted then he "would have been without just ground of complaint."

It seems to us that the principles settled in Covington Stock Yards Company vs. Keith are controlling in the case at bar; and, as heretofore suggested, the Circuit Court of Appeals so held, not only in this case, wherein the opinion was delivered by Judge Day, now Mr. Justice Day, but so held also in the preceding case of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., 67 Fed. 35, in which the opinion of the Circuit Court of Appeals was delivered by Judge Taft.

In this last case of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., 67 Fed. Rep. 35, Judge Taft also dis-

cusses another question which is pertinent to one point made in the case at bar, although no very great stress has been laid upon it. Some complaint is made to the effect that because the Louisville & Nashville Railroad Company makes under certain circumstances special deliveries of *dead freight*, therefore, it is a discrimination against the Central Stock Yards, and against live-stock traffic, to refuse to make special deliveries of *live stock*. This exact question was made in the case above mentioned of Butchers & Drovers Stock Yards Co. vs. L. & N. R. Co., and the court in its opinion by Judge Taft disposes of that complaint in the following language, to wit:

"The evidence clearly shows that the delivery of car-
"load lots of dead freight, and the receipt of them by
"side tracks is much less onerous, and involves much less
"care and responsibility for the railroad company than
"the receipt of live stock from a private yard by a side
"track. One of the chief reasons why deliveries and
"shipments of railroad car load lots by side track are
"possible and consistent with the conduct of the business
"of a large trunk line is that the loaded car may stand
"upon the side track for hours, or even a day, until the
"railroad company finds it convenient to back its engine
"down and take it. Such delays are utterly impossible
"in the proper transportation of car loads of live stock.
"When they are loaded they must be moved. The
"evidence shows that in other respects the supervision of
"the switching of cattle cars would be much more
"expensive and troublesome to the railroad company
"than dead freight. Indeed it hardly needs expert
"evidence to establish it. There is no ground, therefore,
"for any charge of unjust discrimination against the

"defendant railroad company as between complainant "and the front street shippers." (The front street shippers being shippers of dead freight.) 67 Fed. 42.

In the case at bar this difference between the handling of live stock and dead freight is fully shown in the testimony of Mr. Walker D. Hines, Vice President of defendant (Rec. 13), and is not controverted. In fact it is shown by all the evidence in the case.

Counsel for appellant in their brief constantly refer to the cases of Coe vs. L. & N. R. R. Co. 3 Fed. 775, and McCoy vs. C. I. St. L. & C. R. R. Co. 13 Fed. 3. These are two Circuit Court cases decided by Judge Baxter; in which he held in effect, that a railroad company could not, by contract with a stock yards company, establish the railroad company's live stock depot at those stock yards, and refuse to receive and deliver live stock at other stock yards in the same city; that to do so would be an unlawful discrimination against the other stock yards; and in which he by mandatory injunction required the railroad companies to receive and deliver live stock at the other stock yards on the same terms and in the same manner as at the stock yards which the railroad company had made its depot.

Those decisions by Judge Baxter were made in 1880 and 1882, long before this court decided the case of Covington Stock Yards Co. vs. Keith, 139 U. S., *supra*, and before the Circuit Court of Appeals decided the case of Butchers and Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed., *supra*, and are utterly inconsistent with the decisions of this court and of the Circuit Court of Appeals in the two cases mentioned. Moreover, Judge Baxter relies in part as authority for the procedure taken by him on what are known as the Express Company Cases, as those cases were decided *in the*

Circuit Court, his decisions being rendered prior to the action of this court which *reversed* the judgments of the Circuit Courts in the Express Company Cases (Express Company Cases, 117 U. S. 1).

This would seem to be a sufficient statement to dispose of Judge Baxter's two Circuit Court decisions; yet they are constantly referred to and strongly relied on by counsel for appellant in the case at bar.

An attempt is made to distinguish between the case at bar, on the one hand, and that of the Covington Stock Yards Co. vs. Keith, 139 U. S., *supra*, and Butchers & Drovers Stock Yards Co. vs. L. & N. R. R. Co., 67 Fed., *supra*, by saying that in the last two mentioned cases the stock yards of the complainants were situated directly upon the line of the railroad company, whereas in the case at bar the Central Stock Yards are not situated on the line of the L. &. N. R. R. Co., but are situated a few hundred yards away from that line, and are upon the line of the Southern Railway Company, which crosses the line of the L. & N. R. R. Co. It is therefore said that the Central Stock Yards Company does not ask the L. & N. R. R. Co. to make a delivery of cars containing live stock directly to *it*, but to make such delivery *to the Southern Railway* at the point where there is a physical connection between the tracks of the two railroad companies, after which the Southern Railway will make the delivery to the Central Stock Yards.

In other words, the contention amounts practically to this: That if there were stock yards situated on the line of the Louisville & Nashville Railroad Company at Seventh and Magnolia (point C on the map), which is a point of physical connection between the tracks of the Louisville & Nashville Railroad Company and those of the Southern Railway, in such case the Louisville & Nashville Railroad Company

could not, under the principles of Covington Stock Yards Company vs. Keith, be required to deliver live stock on a siding *belonging to these stock yards* at Seventh and Magnolia, but that it *can be* required to make such a delivery *at that same point on a siding belonging to the Southern Railway Company*. But, if we are to regard substance in this matter, it must be perfectly apparent to the court that, if the Louisville & Nashville Railroad Company can be deprived of the right to make all deliveries at *its own live stock depot*, and can be required to make deliveries of its cars containing live stock *at some other point* in the city, it would very much rather deliver them directly to another stock yards company having a side track connection with its own track (in which event it would retain control of its cars) than to deliver such cars to *another railroad company* at a side track connecting with that company's track (in which event the latter company would get control of the cars). So far as the loss of advantage in being allowed to deliver all live stock cars at one place is concerned, it is exactly the same in one case as it is in the other. It is just as much trouble and inconvenience, just as much additional annoyance, to be required to take a carload of live stock and deliver it on a side track *connecting with the Southern Railway* at Seventh and Magnolia Avenue as it would be to deliver the same car on a side track at the same place *connecting with a stock yard*, if one happened to be located there at Seventh and Magnolia Avenue. There would be just as much necessity for prompt delivery, owing to the necessities of the live stock, in the one case as in the other; just as much necessity, therefore, for putting aside other work and giving preference to this special delivery to the side track of the Southern Railway, as to the side track of a stock yards that might be located at the same place as the Southern Railway's connection.

But, while the loss of advantage in not being allowed to make all deliveries at its own depot, and the inconvenience and trouble and expense, and disarrangement of other traffic, would be just the same, whether the special delivery be required to be made upon a side track connecting with the Southern Railway or upon a side track connecting with another stock yards, yet, as a matter of fact, if required either to make a direct delivery on the side track of *another stock yards* connecting with its own track, or to make a delivery to *another railroad company* for delivery at another stock yards, the railroad company bringing the stock to the city would *very much rather make the delivery direct to the stock yards on a side track connecting with its own track, than to make such delivery to another railroad company;* because in the first case the railroad company would *retain the control of its own cars*, whereas in the second case it would be compelled to *turn those cars over to another railroad company*, and take the risk of the second company's failure to make a prompt return thereof. If the side track of the stock yards connected directly with the tracks of the Louisville & Nashville Railroad Company, that Company would have complete control over the cars set on the side track of the stock yards, and could simply run in upon that side track and take the car away whenever it felt like doing so. But if once the car is delivered to the Southern Railway, and taken into the possession and under the control of that company, it simply depends upon that company as to when that car will be returned. It may be promptly returned, or it may be greatly delayed. The fact that railroad cars taken into the possession of the connecting carrier are often greatly delayed before being returned, and that this has given rise to most serious complaints by different railroad companies against others, is a notorious fact, and any railroad company would rather

keep possession of its car, if possible, than to turn it over into the control of another railroad company, a matter to which we will hereafter refer in another connection.

It must be manifest, therefore, that if the Louisville & Nashville Railroad Company has a right to establish a live stock depot in a particular city through the instrumentality of the Bourbon Stock Yards Company which engages to provide the necessary facilities, and to contract that it will not deliver live stock elsewhere, this advantage can not be taken from it, and this principle evaded, by simply establishing the Central Stock Yards, not directly on the line of the Louisville & Nashville Railroad, but a little distance off of the line of that road, and upon the line of the Southern Railway, and by then insisting that the delivery of the cars of live stock shall be made, not directly to the stock yards, but to the Southern Railway for delivery to those stock yards; as the loss of advantage and the inconvenience to the Louisville & Nashville Railroad Company in being forbidden to deliver solely at its own depot, and in being required to deliver to the Southern Railway at its connection therewith, are just as great as if the delivery were required to be made to a stock yards directly upon a line of the Louisville & Nashville Railroad, whereas the fact that in case of delivery to the Southern Railway that company would get possession and control of the Louisville & Nashville Railroad Company's cars, while in case of delivery to a stock yard direct upon its own track, the Louisville & Nashville Railroad Company would itself retain control af its own cars, would, of course, make it prefer the direct delivery to the stock yards over a delivery to the Southern Railway for delivery to the stock yards.

In conclusion upon this point we repeat that when the real nature of this case is understood it is seen to be a case

which does not properly involve the principles governing the exchange of traffic between connecting carriers, or the duty of a railroad company to receive shipments destined to points beyond its own line, and to carry the same to such distant point, or to forward the same by another connecting carrier. It is really a case, such as the Butchers' Stock Yards case, in 67 Fed. Rep. 35, and the Covington Stock Yards case in 139 U. S. 128, governing the question of the duty of a railroad company as to making *deliveries of live stock when the same has reached its destination.* And we submit, under the principles of the cases mentioned, that when live stock is offered to the Louisville & Nashville Railroad Company in Tennessee for transportation to the city of Louisville, and destined to stop at the city of Louisville, the Railroad Company can say that it will deliver the same at its live stock depot in that city, but that it will not deliver it at any other point, either directly to a stock yards company, or a butchering and packing company on its own line, or to another railroad company for the purpose of being switched to such stock yards or packing establishment; and the fact that the Central Stock Yards happens to be a few feet outside of the boundary of the city of Louisville, and that the Southern Railway has chosen to call that a "station," does not present a case different in the slightest degree from what it would be if the Central Stock Yards were situated a few feet west of where they are, so as to bring them within the city boundary, or if the Southern Railway had not chosen to call it a station; for we have already seen that it is perfectly plain that all parties consider the Central Stock Yards as a Louisville institution, so much so that the contract between it and the Southern Railway makes it the Louisville live stock depot of that railway.

As bearing upon the question of the difference between forwarding freight by a connecting carrier, as those expres-

sions are ordinarily understood, and on the other hand, merely turning over freight which has reached its destination to another company, to be delivered at a particular point in a city, we refer the court to the case of Western, &c., R. Co. vs. Exposition Cotton Mills, 81 Ga. 522 (7 Southeastern Rep. 916), and also to the case of Nanson vs. Jacob, 12 Mo. App. 125, subsequently affirmed in 93 Mo. 331.

IV.

Through Routing.

It seems to us the consideration already suggested should be conclusive of this case, for, as heretofore said, it is not a case legitimately involving the question of the duty of a railroad company either to carry to a point beyond the terminus of its own line, or to deliver to a connecting carrier for that purpose; but it is a case which legitimately only involves the question as to the duty of a railroad company to deliver live stock when its destination is the terminus of the receiving company's line. But if we should be mistaken in this proposition, and if this is a case which legitimately involves the consideration of the duty of a railroad company as to freight tendered to it which is destined to a point beyond its line and on some connecting carrier's line, and especially where the shipper demands that the freight go forward on the connecting line *in the cars of the receiving company*, then let us see what is the law on this subject.

We ask the court particularly to remember that this is not a case where a railroad company has *received* freight, and issued a bill of lading for it, *destined to a point beyond its own line*, and where the same has been lost or

delayed on the connecting line. Neither is it a case where, having *received* such freight and issued its bill of lading, showing a destination beyond the company's own line, there has been a loss during the act of transferring to the connecting line. It is out of those two classes of cases that we so frequently find litigation arising as to whether the first company contracted to carry to the ultimate point of destination beyond its own line, or as to whether it simply contracted to carry to the terminus of its own line and then to deliver to a connecting line to be by it carried to destination. Frequently, also, in such classes of cases, where it is conceded that the contract was only to deliver to a connecting line, we find controversies arising as to whether the delivery has been complete at the time of some loss, or as to whether proper shipping directions have been transmitted, etc. But in the case at bar it is not alleged that the Louisville & Nashville Railroad Company has violated any obligation as to any freight which it has accepted marked for a destination beyond its own line, or for which it has issued any bill of lading showing its destination to be a point beyond the line of the Louisville & Nashville Railroad. The sole complaint is that it *will not accept* live stock destined for the Central Stock Yards, which complainant says is beyond the line of the Louisville & Nashville Railroad company; and *will not issue a bill of lading* showing said Central Stock Yards to be the destination of the stock; but that it will only accept live stock destined for a point on its own line; and *that it will not turn over its cars containing such live stock to a connecting line, and accept the undertaking of the connecting line to return the cars and to collect and account for the freight charges.*

Counsel for complainant (appellant) in their brief in this court insist that the Circuit Court of Appeals misconceived

the nature and scope of the relief sought. We do not think so. It is true, in the brief there are concessions and offers made, which nowhere appear in the bill, or anywhere else in the record, and which were evidently never thought of at the time the bill was drawn or filed. But the demands, even as stated in the brief, are without any justification in law, common or statutory, as we understand it, and as the Circuit Court of Appeals understood it.

In the brief it is said that of course defendant Railroad Company has the right to demand *prepayment of its freight charges*, and that complainant never meant to ask relief on any other condition. (Brief p. 40.) Yet there is no intimation of anything of this kind in the bill, but on the contrary it expressly alleges that the connecting railroad company (Southern Railway) has offered and "is now willing to be responsible, from such points of connection, for the delivery of such live stock, and *the collection of all charges on same*, and would promptly return to such points of connection all empty cars, and *account for all freight charges in the usual way*." (Rec. 3.) And, furthermore, a witness (T. C. Powell, agent of the Southern Railway) was introduced to prove that the Southern Railway had notified the defendant that the Southern would be thus responsible, and "that it is the universal custom between reputable and solvent railroad companies to make delivery of car load lots of freight of any and all kinds, *without exacting prepayment of freight*, under notices of the character above set forth, *where the receiving common carrier becomes responsible for such delivery and collection of all charges on same*." (Rec. 25.)

It is true, this was denied and contradicted by defendant, but what was the purpose of this allegation in the bill, and this testimony of a witness, if complainant always conceded defendant's duty to carry only on *prepayment of charges*, and

if "nothing more is asked or intended to be asked by said bill." (Brief p. 40.)

But aside from this question of prepayment of charges, let us look at the demands as outlined in the brief. Counsel say:

> "This court is simply asked to compel the Louisville "& Nashville Railroad Company, as it is its duty to do, to "receive shipments from owners and consignors of live "stock, and to show upon said bill of lading, as in its live "stock contract filed, the destination of said shipment, "and to deliver same to the connecting carrier; . . . "and the law requires him to also deliver to such connect- "ing carrier, on the delivery of such freight, the instruc- "tions of the shipper as to destination; and the contract "filed shows a blank left to indicate destination;" (Brief, p. 38) and to this statement of demand, here made, is added the additional claim later in the brief, that "the initial "carrier . . . must deliver same, *without breaking* "*bulk*, that is, *without unloading*, and must *permit its cars* "*to be used to the destination of said shipment.*" (Brief, p. 55.)

Furthermore, complainant filed the printed form of contract, above referred to, and counsel say in their brief this is "such a contract as was suggested to the court, upon the hearing, should be entered into by the Louisville & Nashville Railroad Company, as to shipments of live stock tendered to it, destined to the Central Stock Yards." (Brief, p. 37.) And when we turn to that form of contract we find it contains a blank for a date, also a blank for the name of the consignee and the destination (which blank as to destination complainant desires to have filled with Central Stock Yards,

a point on the line of the Southern Railway), and also a blank for a guaranty that the freight rate "from point of shipment to destination" shall not exceed a certain sum. (Rec. 58.)

This is the demand expressed in the brief, and amounts to this, that the Louisville & Nashville Railroad (1) accept live stock, say at Nashville, Tenn., which the shipper desires to consign to some one in or near Louisville, but at a point off the line of the Louisville & Nashville Railroad, and on the line of a connecting railroad; and (2) that it issue a bill of lading showing the destination to be at a point off its line and on the connecting carrier's line; and (3) that it guarantee that the freight rate "from place of shipment to destination" shall not exceed a certain sum; and (4) that it load that stock in one of its cars and carry same to Louisville; and (5) that there, at some point of physical connection with the Southern Railway, it deliver its (L. & N.) car, with the stock in it, to the Southern Railway, to be by it carried to Central Stock Yards and the stock delivered from it to the consignee at that place.

And just in this connection we may ask *what is to become of the car after it is thus taken by force from the possession of the owner?* Who is to see to its return? Who is to pay the owner for the use of it, while it is gone from his possession? Who is to pay the value of it, if it is never returned? Or again, if upon final delivery of the cattle by the connecting carrier, and the inspection thereof by the consignee, it is found that some of them have been injured in transit (as often happens), who is to fix the responsibility for this injury; who is to pay for it, or how is it to be shared by those who have participated in the carriage? All of these are matters which are covered by contract between the connecting carriers in case of the voluntary interchange of cars; but how are they to be settled *in the absence of contract?*

These are questions which complainant does not undertake to answer, because they do not interest it. It prefers to let the other party "walk the floor." We had supposed complainant was possibly endeavoring to suggest a solution of this difficulty, when in its bill it stated that the Southern Railway was *willing to agree* with the defendant to be responsible for some of these matters. But when the Circuit Court of Appeals said it had no power to compel defendant to make such an agreement, nor power to make such an agreement for defendant, the response made in the brief filed in this court is that the Circuit Court of Appeals "misconceived the nature and scope of the relief sought by the complainant." We do not think it did. We think it understood the situation exactly.

As to one of the demands of complainant above outlined, counsel may claim they did not mean to demand a guaranty of a certain rate "from place of shipment to destination." That would be the effect of a contract made on the form filed by complainant as a model of what it wanted; but waive that, and still the questions asked above demand an answer, for complainant undoubtedly demands that defendant *give up its cars* to the possession and control of another, to be used by the latter in finishing the transportation and delivery of the cattle in them to the consignee. And so long as this is true, the questions asked above call for an answer.

The demands of the complainant being as above outlined, whether we look to its bill or to the brief of its counsel, the question therefore arises in this case, is it the duty of a railroad company either at common law, or under the Interstate Commerce Act, to accept freight marked for a destination beyond the line of that company, and to issue a bill of lading showing such a destination; and is it in any event its duty to *deliver its own cars containing such freight*

to a connecting carrier, in order that the freight may be transported without change of cars to a point beyond the receiving company's line?

A. In the brief of counsel for appellant is a discussion of what are said to be the "common law duties of common carriers"; and reference is made to many authorities on the proposition that "in the absence of any agreement, either express or clearly implied, for transportion beyond its own lines, the common law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be."

The quotation just made is from Elliott on Railroads, Volume 4, Section 1432. But, if the authorities cited either by counsel for complainant or by Elliott in support of this proposition be examined, it will be found that they are all upon the question as to what is the duty of a common carrier when it has once *accepted* for transportation *goods marked to a destination beyond the carrier's own line.* And in the vast majority of the cases it will be seen that the carrier had not only accepted goods thus marked, but had issued a bill of lading expressly agreeing to deliver to a connecting carrier. They, with one exception, *do not bear upon the question of the duty of a common carrier to accept goods marked for a destination beyond its own line.* The one exception to this statement is Inman & Co. vs. St. Louis, etc., R. Co., 37 S. W. Rep. 37, decided by the Civil Court of Appeals of Texas, an intermediate appellate court, in which the court does seem to hold that a carrier was required at common law to accept goods for a point beyond its line. It is difficult, however, to understand why the court in that case found it necessary to discuss or decide this proposition, as the case was completely covered by a Texas statute (there

being no question of interstate commerce involved), and the court itself so holds.

We think the foregoing statement is sufficient to dispose of the authorities cited in the brief of appellant on the subject of the common law duty of carriers in the respect mentioned.

Let us, however, see if we can arrive at the law upon this subject from an examination of other authorities.

In Hutchinson on Carriers, Section 145, this careful author lays down the following proposition, which, so far as we know, is undisputed:

> "No carrier is bound by law to accept goods for car-
> "riage further than the terminus of his own line, and if
> "in any case, therefore, he is to become liable as a carrier
> "beyond such terminus, *his liability must be based upon*
> "*some further obligation than that created by law.*"

Starting with this fundamental proposition, there has arisen a diversity of opinion as to what is the effect *if the carrier does accept* goods marked to a destination beyond the carrier's own line. The diversity of opinion on this subject has given rise to what are called the English rule and the American rule, some American courts adopting the English rule, but the great majority of them, including the Supreme Court of the United States, adopting a different rule, called the American rule.

The English rule adopted in what is known as Muschamp's case (Muschamp vs. Lancaster & Preston R. Co., 8 Mee. and Wels. 421), decided in 1841, is that, if a common carrier accepts goods marked for a destination beyond his own line, this is *prima facie* evidence of a contract to carry to the destination as marked; whereas the American rule, as

asserted, for example, in Myrick vs. Michigan Central R. Co., 107 U. S. 102, is that from the mere acceptance of goods marked to a destination beyond the carrier's line the law will not imply an obligation to carry to this destination, but only to deliver to a connecting line for such purpose, so that the liability of the receiving company as common carrier ceases with such delivery.

In Muschamps case above referred to (8 M. & W. 421) the reasoning of Lord Abinger was as follows:

> "The simple question in this case is, whether the "learned judge misdirected the jury in telling them that, "if the case were stripped of all other circumstances "beyond the mere fact of knowledge by the party that "the defendants were carriers from Lancaster to Preston, "and if, under such circumstances, they accepted a parcel "to be carried on to a more distant place, they were liable "for the loss of it, this being evidence whence the jury "might infer that they undertook to carry it in safety to "that place. I think that in this proposition there was no "misdirection. It is admitted by the defendants' counsel "that the defendants contract to do something more with "the parcel than merely to carry it to Preston. They say "the engagement is to carry to Preston and there deliver "it to an agent who is to carry it further, who is after- "wards to be replaced by another, and so on, until the "end of the journey. Now, this is a very elaborate kind "of a contract . . . Is it not, then, a question for the jury "to say *what the nature of this contract was?*"

In other words, Lord Abinger's reasoning was that by the acceptance of the goods marked for a destination beyond the carrier's line it was conceded that *some kind of a contract was*

made, the difference between the contentions of the two parties being that plaintiff contended that a contract was thereby made to carry to the destination marked, whereas the defendant contended that it was only a contract to carry to the terminus of its line and there to deliver to a connecting carrier. In either event, reasons Lord Abinger, there is an admitted contract to do something more than simply carry to the terminus, and it is a question for the jury to say *how much more* than this the defendant contracted to do, it being a reasonable inference, in Lord Abinger's opinion, that it intended thereby to contract for a carriage to the ultimate destination.

Now, when we remember that it is universally conceded that a railroad company is not bound under its common law obligation as a carrier to carry beyond its own line, and that, if it does undertake to do so, this is entirely a matter of voluntary contract, does it not necessarily follow from the reasoning of Lord Abinger that the carrier can not be *required* to accept goods marked to a destination beyond its own line? It seems to us that it does. The courts say to him: You are not bound under your common law duty to carry beyond your line: but if you accept goods marked for a destination beyond your line, this will be received as *prima facie* evidence of a voluntary contract to increase your common law duty, and to carry to the destination as marked. It must necessarily follow, therefore, that in the opinion of Lord Abinger, and of all the courts which have followed his opinion, the common law imposed no obligation on the carrier to accept goods marked for a destination beyond his line.

Now the American courts have not indicated any dissent whatever from this conclusion as to the common law obligation of the carrier. Their rulings have simply been *more favorable to the carrier* than the English rulings as to the

interpretation which they put upon the carrier's act if he does accept goods marked to a destination beyond his line. While the English courts (and such of the American courts as follow them) interpret the acceptance by the common carrier of goods thus marked as evidence of a contract to carry to destination, the American courts interpret such act of acceptance merely as a contract to deliver in safety to a connecting carrier. Not only is there nothing in the American cases contrary to the proposition just asserted, but we think the case heretofore mentioned, and which is relied on by appellants as "an instructive case on the common law duties of common carriers," to wit, Myrick vs. Michigan Central R. Co., 107 U. S. 106, directly supports the conclusion we have just asserted. That was a case in which the carrier had accepted goods and issued a bill of lading showing that the ultimate destination was a point beyond the carrier's line. The question was as to the effect of this acceptance. Speaking on that subject, the court, through Mr. Justice Field, said:

> "A railroad company is a carrier of goods for the pub-
> "lic, and, as such, is bound to carry safely whatever
> "goods are intrusted to it for transportation, within the
> "course of its business, to the end of its route, and there
> "deposit them in a suitable place for their owners or
> "consignees." (Page 106.)

The foregoing is a complete sentence in the court's opinion, and is, we think, a complete statement of the duty of a common carrier in the matter of transportation and delivery. Having asserted this proposition, the court then adds the following:

> "*If* the road of the company connects with other
> "roads, and *goods are received* for transportation beyond

"the termination of its own line, there is superadded to "its duty as a common carrier that of a forwarder by the "connecting line; that is, to deliver safely the goods to "such line, the next carrier on the route beyond. *This "forwarding duty arises from the obligation implied in "taking the goods for the point beyond its own line.*" (Our italics.)

The court then proceeds to show that while the English courts have adopted the rule heretofore explained as to the effect of accepting goods for a point beyond its own line, yet the American rule is otherwise, referring to the preceding case of Railroad Co. vs. Manufacturing Co., 16 Wall. 318, which was likewise a case where a railroad company had accepted goods and issued a bill of lading expressly stating the destination to be a point beyond its line and in effect agreeing to deliver to a connecting carrier, the question being whether this constituted a contract to carry through or only a contract to forward.

Now we submit that it is plain from this language of the court, in the words of Mr. Justice Field, that the common law duty of a common carrier is simply to carry to a destination on its own line and there deliver to the owner or consignee; but that if it does voluntarily accept goods for a destination beyond its own line, then under the American rule an obligation will be implied from this act to deliver to a connecting carrier for transportation to the destination as marked. These two cases of high authority, to wit, Muschamp's case under the English rule, and Myrick vs. Michigan Central R. R. Co. under the American rule, seem to us clearly to show that both in England and America the carrier's common law duty, independent of any contract, express or implied, has been considered to be simply to carry to some

destination on his own line, and only to receive goods destined for some point on his own line; but that if he does choose to receive goods destined for a point beyond his line, then an implied contract will arise to do more than his common law duty, and either to carry to the ultimate destination of the goods (under the English rule) or deliver to a connecting carrier for that purpose (under the American rule). We shall make no attempt to examine or cite any other cases on this question of common law liability. The name of cases which have been decided and reported upon this subject is legion. The two cases which we have cited seem to us sufficient to establish the proposition for which we contend, as heretofore expressed.

B. When we pass from general considerations as to the duties of carriers with reference to freight in any form, to the specific question arising in this case as to whether or not, either at common law or under the Interstate Commerce Act, a railroad company can be required to receive freight destined for a point beyond its own line, and load it into its cars, and then, after transporting same over its line, be compelled to deliver its cars with the freight in them to another railroad company, to be transported to the ultimate place of destination, looking to the connecting carrier for the return of the cars, and compensating for their use, the authorities are even plainer than upon the general propositions we have been heretofore discussing.

From the standpoint of the common law, without regard to the provisions of the Interstate Commerce Act, we have the authority of this court in the case of Atchison, etc., R. Co. vs. Denver, etc., R. Co., 110 U. S. 667. In that case there was a physical connection betweeen the tracks of the Atchison, Topeka & Santa Fe R. Co. and those of the Denver & New Orleans Railroad at a point some little distance from the

depot of the former company. The Atchison Company had formed a through line with a third company, with which it exchanged business, including cars, and over which through bills of lading for freight, and checks for passengers, were issued and sold. An effort was made by the Denver, etc., R. Co. to compel the Atchison, etc., R. Co. to exchange cars with it, at the aforesaid point of connection, and also to issue through bills of lading, through checks, etc.

This court held that, although there was a physical union between the two tracks at the place above mentioned, yet the Atchison Company was not required by any common law principle to establish the character of business relations desired by the Denver Company. After an extended examination of this subject the court concludes this branch of the case as follows:

"This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature can not take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on *legislative regulation*, or *contract obligation*. An *interchange of cars*, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars." (P. 683.)

The court having already said in a preceding part of its opinion that the Atchison Company was not required to stop at this junction, it follows, of course, that it was not required to exchange cars at the junction, either by delivering cars to the Denver Company or by receiving cars from the Denver Company. It is said in the case at bar that the Louisville & Nashville Railroad Company does exchange cars under some circumstances with the Southern Railway at their connection in Louisville. It is true that it does do this under certain circumstances. But whenever it does it, it is pursuant to a voluntary contract or arrangement between the two companies. And it has never voluntarily exchanged cars with the Southern Railway destined to or originating at what is called "Central Stock Yard Station." *It has never recognized such a place as a station for which it would receive, or to which it would deliver, freight of any kind.* And in the case just cited the court expressly held that a railroad company has the right to locate its stations, and that, in the absence of contract or statutory right, a court of equity can not compel it to locate a station at one place, because it has located another one somewhere else. (110 U. S. 682.)

Considered from the standpoint of the Interstate Commerce Act, we can not point to any decision by this court upon the question under discussion as to the compulsory interchange of cars between connecting railroad companies; but we can point to a number of decisions by the courts next in authority to this court, and to opinions delivered by eminent judges, some of whom have since become members of this tribunal. That the Interstate Commerce Act does not require the formation of through routes, or the interchange of cars between connecting lines, has been expressly determined not only by the Court of Appeals for the *Sixth Circuit* in the case at bar, in an opinion by Judge Day, now

Mr. Justice Day, but also by the Court of Appeals for the *Ninth Circuit* in the case of Oregon Short Line R. Co. vs. Northern Pacific R. Co., 61 Fed. 158, in an opinion by Judge McKenna, now Mr. Justice McKenna, and also by the Court of Appeals for the *Eighth Circuit* in Little Rock & Memphis R. Co. vs. St. Louis Southwestern, etc., R. Co., 63 Fed. Rep. 775, in an opinion by Judge Thayer, and was also decided by the late Judge Jackson, afterward Mr. Justice Jackson, in the case of Kentucky & Indiana Bridge Co. vs. L. & N. R. Co., 37 Fed. Rep. 567, 630, in an opinion in which the powers of that great judge were probably as clearly exhibited as in any opinion he ever wrote. Moreover, the decision above mentioned by the Circuit Court of Appeals of the Ninth Circuit was an affirmance of a judgment to the same effect rendered by Mr. Justice Field in Oregon Short Line R. Co. vs. Northern Pacific R. Co., 51 Fed. 465. The same question was likewise decided in the same way by Judge Caldwell in Little Rock, etc., R. Co. vs. St. Louis, etc., R. Co., 41 Fed. Rep. 559. And the principle underlying the proposition is decided also by the case of Chicago, etc., R. Co. vs. Osborne (52 Fed. 915), in an opinion by Mr. Justice Brewer; the principle being that connecting companies can not be compelled to contract with each other.

These decisions as to the effect of the Interstate Commerce Act on this question of the formation of through routes and the interchange of cars have been largely influenced by a comparison between the provisions of the Interstate Commerce Act and those of the English Railway and Canal Traffic Act, upon which it is known that the Interstate Commerce Act was largely modelled. The difference between the two acts, and the striking fact that the English act contains an express provision for the formation of *through routes* over connecting lines, and for the establishment of through

rates, while the American act, modeled after it, wholly omits this provision, was early noticed by the Interstate Commerce Commission, and the attention of Congress called to that fact and an amendment to the act suggested by the commission itself, which amendment, however, was not adopted and never has been adopted.

Extracts from the English Railway and Canal Traffic Act will be found in the opinion of the Interstate Commerce Commission in Little Rock, etc., R. Co. vs. East Tennessee, etc., R. Co., 3 Interstate Commerce Commission Reports, 1, 6, and also in an appendix to this brief, from which it will be seen that the English statute, after using practically the language which we find in the third clause of the Interstate Commerce Act, as to affording facilities for the interchange of traffic, then contains the further provision that:

> "Said facilities to be so afforded are hereby declared to "and shall include the due and reasonable *receiving, for-* "*warding and delivering* by every railway company and "canal company, at the request of any other such com- "pany, of *through traffic to and from the railway or* "*canal of any other such company*, at through rates, tolls "or fares, etc."

Then following this language in the English act is a number of provisions establishing a system for the enforcement of it, which system in effect provides for an attempt as between the carriers themselves to establish the route and to fix the rates, and then authorizes the commission, in the event the carriers can not agree or will not agree, to take the matter up and establish, or refuse to establish, the route as a through route, and to determine upon the question of rates. (3 Interstate Commerce Commission Reports, p. 7.)

No such provision as this is found in the Interstate Commerce Act; and the commission on December 1, 1888, the year after the passage of the act, recommended to Congress the adoption of an amendment to the act, the first sentence of which is as follows, to wit:

> "The facilities to be so afforded shall include the due "and reasonable receiving, forwarding and delivering by "every such common carrier at the request of any other "such common carrier, of through traffic at through "rates or fares."

Then following this language comes further provision in the suggested amendment as to how this provision might be enforced; the substance of the suggestion being that if the carriers can not agree, then the commission shall take up the matter, and

> "The commission shall then have power to determine "whether, having regard to all the circumstances, the "route proposed is demanded in the public interests and "is a reasonable route for the traffic, and if the commis- "sion shall so find, and the rate or divisions are not "assented to, the commission shall have the further "power to prescribe the same." (2 Interstate Commerce Commission Reports, p. 511. See also appendix hereto.)

The recommendation of the commission, as thus made on December 1, 1888, was again repeated by it in its decision of the case of Little Rock,etc.,R. Co. vs. East Tennessee,etc.,R. Co., 3 Interstate Commerce Commission Reports, 1, 15. This latter recommendation was made on March 25, 1889. Fifteen years have now passed since that recommendation was first

made by the commission, and, although the act has been several times amended in other respects, it has never been amended in this respect. But this omission by Congress is made still more striking, and practically conclusive, by the fact that since that recommendation by the commission the matter has been referred to and made the basis of a number of decisions by the Circuit Courts and Circuit Courts of Appeals of the United States, and still Congress has failed to act.

As early as January, 1889, Judge Jackson in the case of Kentucky & Indiana Bridge Co. vs. L. & N. R. Co., 37 Fed. Rep. 567, referring to the Interstate Commerce Act and the powers of the commission thereunder, said:

> "*Neither is the commission invested with authority to* "*establish through routes, or to fix through rates, between* "*connecting lines.* The English act of 1873, amendatory "of the act of 1854, did confer such authority, in pro- "viding that 'the said facilities to be afforded are hereby "declared to, and shall, include the due and reasonable "receiving, forwarding and delivering by any railway "and canal company, at the request of any other such "company, of through traffic to and from the railway or "canal of any other such company, at through rates, tolls "or fares.' . . . Our act to regulate commerce contains "no such provision, and confers no such authority. The "English cases under the act of 1873, cited by counsel, "can not, therefore, have any bearing upon the present "case and need not be referred to." (Page 630.)

It will be observed that Judge Jackson here distinguishes, and distinguishes properly, between "through routes" and "through rates," and says the commission is not authorized to establish *either*.

This decision was followed by Judge Caldwell, in March, 1890, in the case of Little Rock, etc., R. Co. vs. St. Louis etc., R. Co., 41 Fed. Rep. 559, 563.

It was again followed by Mr. Justice Field, in June, 1892, in Oregon Short Line etc., R. Co. vs. Northern Pacific R. Co., 51 Fed. Rep. 465, where the effort was being made, not to compel one company to *give* its cars to another, but to compel one company to *receive* cars from another, and to haul them as a continuous shipment. And in this same case before Mr. Justice Field a provision of the defendant's charter was also relied on, which in effect provided that it should "form running connections" with other railroads connecting therewith. The court held that this language did not justify the demand made, and in that connection said:

> "Whenever an intention has been manifested, in the "creation of railway charters, that a connecting company "shall have the power to run its cars over the lines of "another, or to require one company to haul over its lines "the cars of another, such intention has been expressed in "unequivocal terms, such as is found in the constitutions "or statutes of several of the States, respecting railway "companies, which is substantially in these terms: 'And "they shall receive and transport each other's passengers, "tonnage and cars, loaded or empty, without delay or dis-"crimination.'" (P. 475.)

This decision by Mr. Justice Field is probably rendered even more striking by the fact that Judge Deady, who sat with him, dissented from his conclusions, both as to the requirements of the Interstate Commerce Act and also as to the requirements of the defendant's charter. But the case was appealed to the Circuit Court of Appeals for the Ninth

Circuit, where the judgment entered pursuant to Mr. Justice Field's opinion was affirmed in an opinion delivered by Judge McKenna, now Mr. Justice McKenna, of this court, in Oregon Short Line, etc., R. Co. vs. Northern Pacific R. Co., 61 Fed. 158.

In this latter opinion the Circuit Court of Appeals quotes and expressly approves the language of Mr. Justice Field, heretofore quoted, to the effect that wherever legislatures have intended to require an interchange of cars they have said so in unmistakable terms. And the court also notes the opinion expressed by the Interstate Commerce Commission in Little Rock, etc., R. Co. vs. East Tennessee, etc., R. Co., 3 Interstate Commerce Commission Reports, 1, to the effect that the Interstate Commerce Act was intended to effect the same results as were intended by the English act, but had simply *omitted the machinery to accomplish it.* Referring to this, Judge McKenna says:

> "It would seem like better reasoning to assume that, if "Congress had intended the same results as the English "act, having it and its history and construction before "them, it would have adopted its language and machinery, "and made the result certain." (61 Fed. 161.)

Again the question came, with the same result, before the Circuit Court of Appeals of the Eight Circuit in a striking case, to wit, Little Rock, etc., R. Co. vs. St. Louis Southwestern, etc., R. Co., 63 Fed. Rep. 775, wherein the opinion was delivered by Judge Thayer, in September of 1894. In this case the Little Rock & Memphis R. Co. was complaining of several other railroad companies for discrimination against it. Counsel for complainant in the case at bar refer to that case as if it had mainly to do with the question of the right

of a carrier to demand *prepayment of freight.* But this is incorrect. It did involve that question, but this was by no means the most important question involved. As against the St. Louis Southwestern, etc., R. Co. the complainant's bill alleged "that it required all freight to be *rebilled* and *reloaded*, and all passengers to purchase new tickets, at the town of Brinkley, while at the same time it accepted through tickets and through bills of lading, and *cars loaded in carload lots*, that came over the line of the St. Louis, Iron Mountain, etc., R. Co." And again, as against the Little Rock & Fort Smith Railroad Company, the complainant's bill alleged "that it exchanged freight with the St. Louis, Iron Mountain & Southern Railway Company upon an arrangement for through billing, and *in the cars in which it was shipped*, when shipped in carload lots, and that it refused at the same time to exchange freight with the Little Rock & Memphis Railway Company, except upon local rates, *and that it refused to accept from or deliver to the latter railroad any loaded cars.*" The foregoing statements as to the allegations of the bill are quoted from Judge Thayer's statement of the facts in the case. These facts were admitted by demurrers to the bill. The Circuit Court sustained the demurrers and dismissed the bill; and the Circuit Court of Appeals affirmed the judgment; so that there was not only a refusal to grant the entire relief demanded by the complainant, but a refusal to grant any part of it.

On the subject of the interchange of cars, traffic, etc., the court said:

> "Before discussing the precise issue which arises upon "this record, it will be well to restate one or two proposi- "tions that are supported by high authority as well as "persuasive reasons, and which do not seem to be

"seriously controverted even by the complainant's "counsel. In the first place the interstate commerce law "does not require an interstate carrier to treat all other "connecting carriers in precisely the same manner, *with-* "*out reference to its own interests. Some play is given* "*by the act to self-interest.* . . . In the second place "it has been held that neither by the common law, nor "by the interstate commerce law, have the national "courts been vested with jurisdiction to compel inter- "state carriers to enter into arrangements or agreements "with each other for the *through billing of freight*, and "for joint through rates. Agreements of this nature, it is "said, under existing laws, *depend upon the voluntary* "*action of the parties and can not be enforced by judicial* "*proceedings without additional legislation.*" (P. 778.)

And again, in the latter part of the opinion, returning to this same subject, the court said:

"Furthermore, it is the settled construction of the act, "as we have before remarked, that it does not make it "obligatory upon connecting carriers to enter into traffic "arrangements for through billing and rating, either as "to passenger or freight traffic. This conclusion has "been reached by all of the tribunals who have had "occasion to consider the subject, and it is based on the "fact that, in enacting the commerce act, Congress did not "see fit to adopt that provision of the English Railway "and Canal Traffic Act, passed in 1873, which expressly "empowered the English commissioners to compel con- "necting carriers to put in force arrangements for through "billing and through rating, when they deemed it to the "interest of the public that such arrangements should be

"made. Little Rock & M. R. Co. vs. East Tennessee, etc.,
"R. Co., 3 Interst. Commerce Com. Rep. 1, 9, 10; K. &
"I. Bridge Co. vs. L. & N. R. Co., 37 Fed. 567, 630, 631.
"See, also, the second annual report of the Interstate
"Commerce Commission (2 Interst. Commerce Com. R.
"510, 511)." (P. 781.)

The question of whether a railroad company is willing to receive cars from another company, or to give up its own cars to another company, are questions largely depending upon the particular conditions existing at particular times and especially upon the question of car supply. Railroad companies sometimes are willing to let their cars go to other companies and get the mileage ordinarily paid for the use of the same, whereas, at other times they prefer to keep their cars on their own roads. On the other hand, they are sometimes willing to accept and use the cars of other companies and pay for them, while at other times they prefer to use their own cars and not use those of another company. These are matters which the law has left to the railroad companies to arrange among themselves according to their business needs and the judgment of their managers. This matter of *exchange of cars* is classed by Judge Jackson in the case of K. & I. Bridge Co. vs. L. & N., 37 Fed. 629, in the same category with arrangements for *joint tariffs* and for *common use of depots*, etc. In this case, he quotes with approval the following language of the Interstate Commerce Commission in Railroad Company vs. Railroad Company, 1 Interstate Commerce Reports, 94, with reference to through tickets, to wit:

"Such tickets very evidently are a great convenience
"to travelers, and perhaps to connecting roads; but they

"are a part of the voluntary arrangements for business "purposes, like *joint tariffs*, *interchange of cars*, and *com-* "*mon use of depots* . . . If companies can agree upon "their tariffs, the form of their tickets and how they shall "be sold, they have the right to do so, and by such "agreement become interstate carriers; but if they can "not agree, the act does not undertake to coerce them to "do business together upon terms that may be justly "objectionable or injurious." (37 Fed. 629.)

And finally in the case at bar, decided in May, 1902, the Circuit Court of Appeals of the Sixth Circuit, in an opinion by Judge Day, now Mr. Justice Day, says:

"No arrangement exists with the Southern Railroad "for the transportation and delivery of cars of live stock "to the Central Stock Yards, if that can be assumed to "be a station on the line of the Southern Railway, nor "do we think a court of equity has the power to make "one and supervise its execution, nor has this right been "conferred upon the courts by the Interstate Commerce "Act. This doctrine is so thoroughly established as to "require no more than the citation of the authorities to "support it." (Citing authorities.) 118 Fed. 118.

Considering the striking difference between the English act and the American Interstate Commerce Act; considering the fact that this difference was pointed out the year after the passage of the Interstate Commerce Act, and a specific recommendation made by the commission for the amendment of that act, so as to require the establishment of through routes and the interchange of traffic, and so as to give the commission the authority to enforce the requirement; and

considering the fact that Congress did not see fit to adopt the amendment; and considering the opinions of the eminent courts and judges heretofore cited upon the question involved, and calling express attention to the failure of Congress to act upon the matter; and considering that down to this day, sixteen years after the original passage of the act, and after all of these many decisions upon it, Congress has still refused to change it in the manner under consideration, we say, keeping in mind all these considerations, it seems to us that the question is practically concluded; and that it must be adopted as the settled law that, neither by the common law nor by the Interstate Commerce Act, have courts of equity any power to compel either the establishment of a through route, with interchange of cars between connecting lines, or the establishment of a through rate; but that these are matters of mutual voluntary agreement between the carriers.

As heretofore suggested, counsel for complainant have argued this case as if the exchange of carload lots of live stock between the L. & N. R. Co. and the Southern Railway Company would not require any character of arrangement or agreement between the two companies. But this is manifestly an incorrect assumption. These cars are of great value, and the live stock in them is of great value. A car containing live stock can not be cast off to one side by a railroad company and left to be picked up at will by another company. There must be some arrangement for the exchange of the cars between the two companies; there must be some agreement as to how the company which owns the car is to be *compensated for the use of the car while out of its possession* and in use by another; there must be some provision as to *how long the car is to be kept*, and as to who is to be responsible for it if it is lost. There must likewise, in the orderly conduct of business of this kind, be some arrange-

ment or agreement for the adjustment and apportionment of losses where, as very frequently happens, stock is injured during transit, and nobody can tell where it was injured, whether on the one line or on the other. These and many other matters are subjects which in the practical operation of the business must be covered by contract, by mutual arrangement and understanding between the parties involved. And just what that arrangement shall be, what agreement they will make, under what circumstances and conditions they will exchange cars, are all matters of voluntary arrangement, which the Interstate Commerce Act does not attempt to control.

As said by Judge Thayer in the Little Rock & Memphis case, heretofore referred to:

> "Another necessary result of the doctrine contended "for by complainant is that it deprives railroad carrier's "in a great measure of the management and control of "their *own property*, by destroying their right to deter- "mine for themselves what contracts and traffic arrange- "ments with connecting carriers are desirable, and what "are undesirable. There ought to be a *clear authority* "found in the statutes for depriving a carrier of this "important right, before the authority is exercised, for, "when questions of that nature have to be solved, *a great* "*variety of complex considerations will present themselves*, "*some of which can neither be foreseen nor stated.*" (63 Fed. 779.)

And in this same connection we may quote the language of Mr. Justice Brewer in Chicago, etc., R. Co. vs. Osborne, 52 Fed. Rep. 912, where, speaking for the Circuit Court of Appeals for the Eighth Circuit, he said:

"While it is the duty of the courts to see that the pro-
"visions established by Congress are not frittered away on
"technical or trifling grounds, yet it is also equally their
"duty to see that such legislation is not carried beyond
"its *clear scope*, and that the owners of private capital
"invested in the business of transportation *be not deprived*
"*of their liberty of contract and right of control* any
"further than the lawmaking power has intended that
"they should be." (Page 914.)

The Louisville & Nashville Railroad Company may be willing to make arrangements with the Southern Railway by which *under some conditions* it will exchange cars of live stock with it. It may be willing, for example, when live stock is simply passing through the city of Louisville, destined for a distant non-competitive point, to transfer the same to the Southern Railway. But on the other hand, it may be wholly unwilling to go to the trouble and expense and inconvenience of transferring the same to the Southern Railway simply for delivery right here in the City of Louisville to the depot of the latter company, when the Louisville & Nashville Railroad Company has a live stock depot of its own in that city, and when it is manifestly to its interest, from every consideration, that live stock brought by it to the city of Louisville should be delivered *at its own stock depot*, whence, if it should leave the city of Louisville again it will likely go out over the lines of the Louisville & Nashville Railroad; rather than be delivered to the *live stock depot of the Southern Railway*, whence, if it leaves the city of Louisville again, it is likely to go over the lines of that company or some other company than the Louisville & Nashville Railroad Company.

We submit, therefore, that neither by the common law nor the Interstate Commerce Act is the Louisville & Nash-

ville Railroad Company required to accept live stock destined to a point beyond its line, or to deliver its cars containing such stock to a connecting carrier, to be transported over the line of the latter.

V.

The State Constitution—Power to Regulate Interstate Commerce.

But counsel for appellant insist that this whole matter is regulated by the Constitution of Kentucky, although it will be observed that the bill of complaint herein expressly confines the complaint *exclusively to interstate shipments of stock;* that although neither the common law obligations of the railroad company nor the provisions of the Federal Interstate Commerce Act may require the defendant to conduct its interstate commerce as complainant desires it to be conducted, yet the State of Kentucky has come to the assistance of Congress and has adopted a constitutional provision "in aid of commerce," and which is as follows:

> "All railroad, transfer, belt lines and railway bridge "companies organized under the laws of Kentucky, or "operating, maintaining or controlling any railroad, "transfer, belt lines or bridges, or doing a railway busi- "ness in this State, shall receive, transfer, deliver and "switch empty or loaded cars, and shall move, transport, "receive, load or unload all the freight in carloads "or less quantities, coming to or going from any "railroad, transfer, belt line, bridge or siding thereon, "with equal promptness and despatch, and without any "discrimination as to charges, preference, drawback or

"rebate in favor of any person, corporation, consignee or "consignor, in any matter as to payment, transportation, "handling or delivery; and shall so receive, deliver, trans- "fer and transport all freight as above set forth, from and "to any point where there is a physical connection "between the tracks of said companies. But this section "shall not be construed as requiring any such common "carrier to allow the use of its tracks for the trains of "another engaged in like business." (Kentucky Constitution, Section 213; Kentucky Statutes, page 148.)

As to what may be the proper construction of this section of the Kentucky Constitution as applicable to business within the State of Kentucky, we will not now stop to inquire, for we think it beyond reasonable doubt that it can have no force as applicable to that class of business to which the bill of complaint in this suit is in express terms confined, to wit, interstate shipments of cattle, or, in other words, interstate commerce.

The theory of the counsel for appellant, as said above, seems to be that the several States can regulate interstate commerce by the adoption of provisions covering such points in the management of this business as they may think are not properly covered by the Federal act governing this subject. In other words, their theory seems to be that *although Congress refused to adopt the recommendation of the Interstate Commerce Commission heretofore mentioned, and refused to amend Section 3 of the Interstate Commerce Act, as recommended by the commission, yet the State of Kentucky has power and authority to come to the relief of the public and provide that regulation of interstate commerce which the Congress of the United States has failed, and, in effect, refused, to provide.* It seems to us that the very statement of this proposition is its answer.

A great deal has been written on the subject of how far the States may make laws which *affect* interstate commerce. It has always seemed to us that this subject is more clearly treated in the case of County of Mobile vs. Kimble, 102 U. S. 691, than in any other case. There the question was as to the validity of an act of Alabama providing for the improvement of the harbor of Mobile. It was insisted that this was used in interstate commerce, and that this act in effect, therefore, regulated interstate commerce. Speaking on this subject of the power of Congress over interstate commerce, the court, through Mr. Justice Field, said:

"That power is indeed without limitation. It autho-
"rizes Congress to prescribe the conditions upon which
"commerce, in all its forms, shall be conducted between
"our citizens and the citizens or subjects of other coun-
"tries, and between the citizens of the several States,
"and to adopt measures to promote its growth and insure
"its safety. And as commerce embraces navigation, the
"improvement of harbors and bays along our coast and
"of navigable rivers within the States connected with
"them falls within the power. The subjects indeed upon
"which Congress can act under this power are of infinite
"variety, requiring for their successful management
"different plans or modes of treatment. Some of them
"are national in their character and admit and require
"uniformity of regulation, affecting alike all the States;
"others are local, or are mere aids to commerce, and can
"only be properly regulated by provisions adapted to their
"special circumstances and localities. Of the former
"class may be mentioned all that portion of commerce
"with foreign countries or between the States which con-
"sists in the transportation, purchase, sale and exchange

"of commodities. Here there can of necessity be only one "system or plan of regulations, and that Congress alone "can prescribe. Its non-action in such cases with respect "to any particular commodity or mode of transportation "is a decision of its purpose that the commerce in that "commodity or by that means of transportation shall be "free. (Pages 696, 697.) . . .

"Of the class of subjects local in their nature, or "intended as mere aids to commerce, which are best "provided for by special regulations, may be mentioned "harbor pilotage, buoys, and beacons to guide mariners "to the proper channel in which to direct their vessels.

"All rules to govern harbor pilotage must depend in "a great degree upon the peculiarities of the ports where "they are to be enforced. It has been found by experi- "ence that skill and efficiency on the part of local pilots "is best secured by leaving this subject principally to the "control of the States. Their authority to act upon the "matter and regulate the whole subject, in the absence "of legislation by Congress, has been recognized by this "court in repeated instances. (Pages 697, 698.) . . .

"Perhaps some of the divergence of views upon this "question among former judges may have arisen from "not always bearing in mind *the distinction between com-* "*merce as strictly defined, and its local aids or instru-* "*ments, or measures taken for its improvement. Com-* "*merce with foreign countries and among the States,* "*strictly considered, consists in intercourse and traffic,* "*including in these terms navigation and the trans-* "*portation and transit of persons and property, as well* "*as the purchase, sale and exchange of commodities.* "*For the regulation of commerce as thus defined there* "*can be only one system of rules applicable alike to*

"*the whole country; and the authority which can act*
"*for the whole country can alone adopt such a system.*
"*Action upon it by separate States is not, therefore,*
"*permissible.*" (Page 702.)

The distinction here drawn is very clear. It is the distinction between the mere *instruments* by which commerce is conducted and, on the other hand, the *commerce itself.* The harbor of Mobile was undoubtedly an instrument used in the conduct of interstate commerce; and therefore a law providing for its improvement did *affect* interstate commerce. But it was not interstate commerce itself. Now the court says that the State has power to make regulations for the improvement of the instruments and facilities for the conduct of commerce (when said instruments or facilities are within the jurisdiction of the State), but that they have not the power to regulate the handling of the commerce itself, as strictly defined. And this commerce, as strictly defined, includes, says the court, "navigation and the transportation and transit of persons and property."

Exactly within the principles of the foregoing cases comes the case of Wisconsin, etc., Railroad Co. vs. Jacobson, 179 U. S. 287, which is greatly relied upon by counsel for appellant in the case at bar. The State of Minnesota had adopted a statute requiring in effect railroad companies, where their lines crossed each other, to put in connecting tracks so that cars might run from one line to the other. It also provided for the establishment of joint rates over the connecting lines, and provided that, if the railroad companies did not establish such rates, the Railroad Commission might establish them. The Railroad Commission made an order requiring two railroad companies, whose lines crossed each other, to put in a connecting track of the character described

in the act. One of the railroad companies resisted this exercise of authority by the commission, and the Supreme Court of the State upheld the validity of the act and the action of the commission. The case was carried by writ of error to this court, where the judgment of the State court was affirmed in an opinion by Mr. Justice Peckham. But in this opinion the court is very careful to say that nothing is involved in the case except the power of the State to require the establishment of these connecting facilities at the point of crossing. After saying that the railroad company insisted that this act was a regulation of interstate commerce, the court says:

"The judgment in this case, however, neither regulates "nor interferes with that commerce, nor does that part "of the statute upon which the judgment is founded. "Whether any portion of the statute does regulate such "commerce is beside the question, and it is not necessary "to here decide. To provide at the place of intersection "of these two railroad companies at Hanley Falls ample "facilities by track connections for transferring any and "all cars used in the regular business of the respective "lines of road over the lines or tracks of one of said "companies to those of the other, and to provide at such "place of intersection equal and reasonable facilities for "the interchange of cars and traffic between their respect-"ive lines, and for the receiving and forwarding and "delivering of property and cars to and from their "respective lines, as provided for by this judgment, would "plainly afford facilities to interstate commerce, if there "were any, and would in no wise regulate interstate "commerce within the meaning of the Constitution. "That is all that has been done by the judgment in

"review. A State may furnish such facilities or direct "them to be furnished by persons or corporations within "its limits without violating the Federal Constitution. "But the Supreme Court of the State, in the opinion "delivered therein, said that there was ample evidence in "the case of the necessity for such track connection result- "ing from the benefit which would accrue to exclusively "State commerce, when considered alone, to justify the "ordering of the connection in question.

"What is said in the statute in relation to the estab- "lishment of joint through rates for the transportation of "freight between points on the respective lines of these "roads within the State, and the manner of enforcing the "establishment of such rates, in case of the omission so "to do by the companies, and as to any unjust or unrea- "sonable charge for the transportation of freight cars, are "all matters which do not arise under this judgment and "may never arise as a result of its enforcement. The "tracks being connected, the making of joint rates is a "matter primarily for the companies interested, and it "may be that they will agree upon them and thus do "away with the necessity of any resort to the courts. "The objection that there is any violation of the Inter- "state Commerce clause of the Constitution is, we think, "clearly untenable." (295.)

In other words, this Jacobson case simply involved the right of the State of Minnesota to require these railroad companies to put in a connection between their two roads where they crossed each other in the State, so that a car might be transferred from one to the other at the point of crossing, and to provide facilities for making such transfer. This was precisely analogous to the statute of Alabama for

the improvement of the harbor of Mobile. In each instance the act was for the improvement of mere facilities for the handling of commerce, and while in this way it affected interstate commerce, it did not regulate the commerce itself.

Now in the case at bar there is no attempt to improve the mere facilities for the conduct of commerce by requiring connection to be put in between the railroads of the Louisville & Nashville and the Southern Railway Company, where they cross each other. It is alleged, and it is a fact, that these connections already exist. There is no attempt here to improve the nature or character of the cars used in the handling of this commerce, or of the roadbed over which it runs, or anything at all of that character. The attempt is *to seize upon the very commerce itself*, as strictly defined in the case of County of Mobile vs. Kimble, and to require that the railroad companies handling such commerce shall transfer it or deliver it to certain persons or in a certain manner, and actually to prescribe how bills of lading shall be issued in Tennessee and Alabama for freight to be delivered in Kentucky. The attempt is to make a rule governing the transportation of this interstate freight, for it must be remembered that this case is confined exclusively to interstate freight; and this is precisely the thing which the Supreme Court in the County of Mobile vs. Kimble says the States can not do.

Counsel for complainant in the portion of their brief devoted to the discussion of the question as to whether or not Section 213 of the Kentucky Constitution is an attempt to regulate interstate commerce, quote the language of this court in the Jacobsen case, which we have just been considering, as found on pages 296 and 297 of the report of that case, where the court refers to the *fairness* and *reasonableness* of the regulation as being matters of appro-

priate consideration. But if the opinion be read, it will immediately be seen that where the court uses this language it is not discussing any question of interstate commerce, or of the validity of the act there attacked on the ground of its being a regulation of interstate commerce, but is defending the validity of the act as against a claim that it deprived the defendant of its property *without due process of law*, in which discussion of course it was very appropriate to consider the reasonableness and fairness of the procedure of which the defendant was complaining.

Counsel also in their brief, in the portion devoted to the discussion of the interstate commerce feature, quote fully two pages from the opinion of this court in the case of Minneapolis, etc., R. R. Co. vs. Minnesota, 186 U. S. 257, which case arose out of the same act of Minnesota which was involved in the Jacobson case. But when we turn to the court's opinion in 186 U. S., we do not find any discussion at all of the question as to whether the act was or was not an attempt to regulate interstate commerce. No such question seems to have been raised, so far as the report of the case shows. But it was insisted, in the language of this court, that the act was unconstitutional because "it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts." (Page 260.)

This exact question as to whether or not a State statute could be held to cover the subject of interchange of traffic and the prepayment of freight, etc., upon interstate commerce was decided by the United States Circuit Court of Appeals for the Fifth Circuit in Gulf, etc., R. Co. vs. Miami Steamship Co., 86 Fed. 407, where the railroad company had made certain arrangements with one steamship company to deliver freight to it, without requiring

the prepayment of freight charges, and also to issue through bills of lading, etc., but had refused to make similar arrangements with another steamship company. A suit was brought to prevent this alleged discrimination, and reliance was placed not only upon the Federal laws, but upon the statutes of Texas, which forbade such a discrimination in general terms, without expressly mentioning either State commerce or interstate commerce, but simply, as just suggested, in general terms. On the subject of the applicability of this State law the court said:

> "Counsel for appellee also cite Articles 4536, 4537 and "4539 of the Revised Statutes of Texas of 1895. It is "shown by the appellee that all the traffic which com- "plainant is engaged in is interstate or foreign com- "merce. Such commerce is subject to exclusive regula- "tion by the national government. This power to regu- "late such commerce is vested in Congress, and is not a "dormant power, but has been put into full exercise by "the Act of February 4, 1887. Hence the article of the "Texas Statutes cited can have no application to such "commerce as the plaintiff is engaged in conducting. "There is nothing in the language of the Texas Statute "that indicates a purpose upon the part of the legislature "that the articles quoted should apply to interstate or "foreign commerce." (Page 420.)

Now, if it be said that the State has the power to regulate the handling of this interstate commerce at Louisville, because Louisville is its destination, the response is that the *delivery* of the freight at the point of destination is as much a part of the commerce as the handling of it upon any other part of the line of transportation. And this has been

expressly determined by this court in the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., where the ferry company was doing business in transporting persons and freight from New Jersey to Pennsylvania, across the Delaware River. An attempt was made to levy a tax upon the business of the ferry company, and it was insisted, in support of the tax, which point was maintained by the Supreme Court of Pennsylvania, that a part of its business was certainly done exclusively in Pennsylvania, to wit, the *landing at the wharf* in Pennsylvania. On this subject this court said:

> "As to the first reason thus expressed, it may be "answered that the business of landing and receiving "passengers and freight at the wharf in Philadelphia "is a necessary incident, indeed is a part, of their trans- "portation across the Delaware River from New Jersey. "Without it that transportation would be impossible. "*Transportation implies the taking up of persons or prop-* "*erty at some point and putting them down at another.*" (Page 203.)

Again in the case of Covington Stockyards Co. vs. Keith 139 U. S. 128, heretofore considered at length, where the court was discussing the question of the relative rights and duties of the parties as to the delivery of freight, the court said:

> "The transportation of live stock begins with their "delivery to the carrier to be loaded upon its cars, and "ends only after the stock is unloaded and delivered, or "offered to be delivered, to the consignee, if to be found, "at such place as admits of their being safely taken into "possession." (Page 136.)

Again, in the case of Fielder vs. Missouri, etc., Railway Co., 42 S. W. 362, the Civil Court of Appeals of Texas reiterates the same proposition as to the handling at terminals. The syllabus of the case is as follows:

"The power of Congress to regulate interstate com-
"merce extends to the necessary switching of cars and
"delivery at terminal points. And an action to recover
"penalties imposed by State statute upon carriers for dis-
"crimination between individuals in regard to terminal
"facilities can not be maintained with respect to freight
"brought from another State, as that matter is covered
"by Federal statute."

And in the course of the court's opinion it says:

"It is as much necessary to the interest of interstate
"commerce and the uniformity of rule that should apply
"to transportation of that character of commerce, which
"is one of the objects intended to be accomplished by
"reserving this power solely to Congress, that it should
"retain control and dominion over the shipments at the
"beginning and terminal points, as well as during the
"actual transportation of the commerce." (Page 364.)

Furthermore, that Congress understood terminal service to be a part of interstate commerce is shown by the amendment to Section 6 of the Interstate Commerce Act adopted March 2, 1889, which expressly provides for the publication of terminal charges, saying:

"The schedules printed as aforesaid by any such com-
"mon carrier shall plainly state the places upon its rail-

"road between which property and passengers will be "carried, and shall contain the classification of freight "enforced, *and shall also state separately the terminal* "*charges*, and any rules or regulations which in any wise "change, affect or determine any part of the aggregate "of such aforesaid rates and fares and charges." (Sup. to U. S. Rev. Stats., Vol. 1, p. 684.)

The case of Council Bluffs vs. Kansas, etc., R. Co., 45 Iowa, 338, 24 Am. Reps. 773, also involves a decision of the question under consideration. The syllabus of the case is very brief, showing but one point involved, and is as follows:

"A State statute required railroad companies connect- "ing with railroads outside the State to transfer freight "and passengers at a point within the State. Held, void "as in conflict with the Constitution of the United States, "giving to Congress the power to regulate commerce "among the States."

Evidently the statute involved in the Iowa case was passed pursuant to the policy of requiring railroad companies to break bulk. In one sense it is just the converse of the Kentucky Constitutional provision as interpreted by complainant in the case at bar.

The foregoing authorities seem to us to show conclusively that Section 213 of the Constitution of Kentucky, if applied to live stock coming from points outside of the State to points within the State, would be a regulation of interstate commerce "as strictly defined;" that it would be a provision not merely for the improvement of the facilities by which commerce is conducted, but a regulation of the commerce itself; and that as thus construed it would be contrary to the Constitution of the United States.

Counsel for appellant refer to certain authorities in support of their proposition as to the power of Kentucky to regulate this commerce.

They refer to the case of Lake Shore Railroad Co. vs. Ohio, 173 U. S. 283. That case involved the validity of a statute of Ohio which required railroad companies to stop three passenger trains a day at all stations having as many as three thousand inhabitants. *It will be observed that it did not make any attempt to regulate the handling, transportation or delivery of either passengers or freight that were interstate in their character.* It left the railroad company to run as many interstate trains a day as it pleased, and to stop them where it pleased, or not stop them at all. It simply provided that three trains a day should be stopped at towns of the size mentioned. If the railroad company stopped these three trains a day, but felt that it was proper or desirable to run interstate trains which did not stop at so many places, it was at perfect liberty to run them. But, as suggested above, there was absolutely no attempt to provide how these interstate passengers should be handled. Accordingly the court held that this was not a regulation of interstate commerce, but was simply a provision by the State for the convenience of its citizens requiring a certain number of trains a day to be stopped at towns of a certain size.

No such question as was involved in the Lake Shore case is involved in the case at bar. There is no attempt by the State of Kentucky to provide how many stock trains a day shall be run, or where they shall be stopped. But the attempt here is to regulate, as has been heretofore said, the interstate commerce itself, to require that live stock offered to the Louisville & Nashville Railroad Company in the State of Tennessee for transportation by a continuous

shipment to a point in the State of Kentucky, shall be received upon certain conditions as to marking or as to the form of the bill of lading to be issued for them, and shall be delivered here at Louisville, in the State of Kentucky, to a certain connecting carrier for transportation to a certain destination. We hardly see how it is open to reasonable question that this is an attempt to make a rule for the governing of this interstate commerce, or, in other words, that it is, in the strictest sense, a regulation of interstate commerce.

A reference is also made to Western Union Telegraph Company vs. James, 162 U. S. 650. This case involved a Georgia statute providing a penalty for failure to deliver telegrams within a certain radius. There was a failure to deliver a certain interstate telegram, and the penalty was imposed. The question involved was the validity of that statute. The court held it to be valid. But in so doing it expressly held that the duty of delivering the telegram *did not rest upon that statute;* that the obligation to deliver the telegram was a part of the common law duty of the telegraph company; and that the statute simply fixed a penalty for failure to perform a common law duty, and therefore could not be called a regulation of interstate commerce. Speaking on this subject, the court said:

"It is the duty of a telegraph company which receives "a message for transmission, directed to an individual at "one of its stations, to deliver that message to the per- "son to whom it is addressed, with reasonable diligence "and in good faith. That is a part of its contract, "implied by taking the message and receiving payment "therefor. The statute in question is of a nature that is "in aid of the performance of a duty of the company

"*that would exist in the absence of any such statute*, and "it is in no wise obstructive of its duty as a telegraph "company. It imposes a penalty for the purpose of "enforcing this general duty of the company. The direc- "tion that the delivery of the message shall be made with "impartiality and in good faith and with due diligence "*is not an addition to the duty which it would owe in the* "*absence of such a statute.* Can it be said that the impo- "sition of a penalty for the violation of a duty which "the company owed by the general law of the land is a "regulation of or an obstruction to interstate commerce "within the meaning of that clause of the Federal Con- "stitution under discussion? We think not." (Page 660.)

We might assume for illustration a somewhat similar case. Suppose Kentucky should pass an act to the effect that where a railroad company injures a passenger by gross or willful negligence, it shall be liable to a penalty of $100. And suppose such a company should, after the adoption of such statute, be guilty of gross or willful negligence, by which some one is injured, and suit should be brought for the penalty. Manifestly the railroad company could not defend such an action by stating that the particular passenger injured had come from Tennessee and was an interstate passenger. The obligation of the company to carry this man safely did not rest upon that statute. It was a common law obligation, and the statute merely imposed a penalty for the violation of that common law obligation which the company owed to that passenger, whether he was an intrastate or an interstate passenger. Such a statute would not in any wise attempt to regulate how the passenger shonld be carried. That is a matter regulated by

the common law, and such a statute would add no obligation to those which the common law imposed. It would merely, as said above, fix a penalty for the violation of that common law obligation, and would impose no new rule for the conduct of such transportation. This is exactly the principle involved in Western Union Telegraph Co. vs. James, *supra*.

But what are the facts in the case at bar? There is here no attempt simply to impose a penalty for the violation of a common law obligation. We have already shown that there was no common law obligation upon the defendant to do business in the manner in which the complainant desires. There is an attempt here, according to complainant's construction of the Kentucky Constitution, to impose a new obligation upon the railroad company, an attempt to prescribe a rule for the conduct of interstate transportation, interstate commerce, which the common law did not prescribe, and which the Federal Interstate Commerce Act does not prescribe. And if this be the true construction of the constitutional provision, it is to that extent void.

In conclusion, therefore, upon this point, we submit that the provisions of the Constitution of Kentucky have absolutely no application to the facts involved in the case at bar; that the State of Kentucky has no power or authority to aid interstate commerce by establishing a rule for its government which the Congress of the United States, although legislating exclusively on the subject of interstate commerce, has not only failed, but has in effect refused, to adopt, after having had the matter pointedly called to its attention.

VI.

Due Process of Law.

In so far as this case involves a demand that the Louisville & Nashville Railroad Company *deliver its cars to the Southern Railway Company*, for use by the latter company in transporting freight to points on the line of the latter company, we submit that there is no power in any tribunal, State or Federal, legislative or judicial, to require this. The cars of a railroad company are its property. They are very valuable property, costing a great deal of money in their original acquisition, and whose use is a most valuable use so long as the cars exist. The railroad company which is well provided with good rolling stock has an immense advantage over one that is not; and one of the problems which a railroad manager has constantly to confront is to keep proper rolling stock upon his road to accommodate its business. And we submit, as said above, that there is no power in any tribunal, under our republican form of government, to take from a railroad company its property consisting in its rolling stock, except by virtue of the power of eminent domain after proper proceedings had for that purpose; and that there is no power anywhere existing to order one railroad company to deliver up its property of this character to another railroad company for use by the latter company, thus taking property out of the possession of its owner and putting it under the control of another, without the owner's consent.

We have already seen, so far as the Federal act to regulate interstate commerce is concerned, that it does not attempt to require the interchange of cars between railroad companies; hence, of course, no question could ever have been decided as

to the power of Congress to require one railroad company to deliver its cars to another.

It is insisted, however, by counsel for appellant that this question has been decided by certain State courts, and that their decisions are reasonable and sound. Let us see if this is true.

Peoria & P. Q. R. Co. vs. Chicago, R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 605, is relied on by counsel, and is likewise relied on in later cases cited by counsel. An examination of this case shows that it does not involve the question of the power to require one railroad company to deliver its own cars to another company. It simply involved the question of the duty of one company to *receive and haul* the cars of another company. And the court based its conclusion upon the proposition that a railroad company in Illinois is a common carrier of "cars," as well as of freight, and therefore that, when cars were offered to it to be hauled, it was under as much obligation to haul these cars as it was to haul freight in cars. This simple statement shows that no question was involved as to the right to require a railroad company to deliver up its cars into the possession of another company.

Burlington C. R. & N. R. Co. vs. Dey, 82 Iowa, 312 (12 L. R. A. 436; 31 Am. St. Rep. 477), is cited upon this subject, and in turn cites for its authority the Illinois case just mentioned. It is not altogether plain as to exactly what the court considered to be involved in that case, although language is used in the opinion which is strongly relied on in the case at bar. Speaking of the case before it, the court, in the majority opinion, says:

"The plaintiff does not allege any other ground of "action than the threatened establishing of '*through joint* "*rates.*' No other objections to the statutes in question, "pertaining to railroads and rates and joint rates, are

"made in the petition; none other are before us for con-
"sideration. It will be here seen that the statutes under
"consideration in no way affect the duty, obligation or
"rights of the plaintiff as a common carrier, further
"than is done by the regulation of rates of charges.
"The law relating to the receipts and delivery of freight
"to connecting lines, and the obligations and rights of
"consignors and consignees and of the railroads, growing
"out of the relations existing when such connecting
"lines exist, are not modified, restricted or in any way
"affected by these statutes." (Page 331.)

But notwithstanding this statement by the court as to what was involved, it does subsequently say in its opinion that defendant objects to the statutes, among other grounds, on the ground "that one company shall surrender its cars to the possession of another, or unload the contents without compensation." (Page 334.) And in answering this contention the court, among other things, says the following:

"7. The course of business of railroad companies,
"originating in the wants and demand of commerce,
"requires the cars of one company to be delivered to
"another for transportation . . . The fact that the trans-
"fer of cars from one company to another, for the trans-
"portation of property over more than one railroad, with-
"out breaking bulk, has been practiced so long as to
"be recognized as of the course of business, *of which*
"*we will take judicial notice* (Peoria & P. R. Co. vs.
"Chicago, etc., R. Co., 109 Ill. 135), is a complete answer
"to the complaints made in the objections under consid-
"eration. Surely a course of business so long pursued,
"and so extensively prevailing, and demanded by the
"commerce of this country, can not, when recognized and

"required by statute, become so objectionable in princi-
"ple, so oppressive in operation, as to require the statute
"to be declared unconstitutional. A railroad company,
"as a common carrier, is required to receive and trans-
"port freight offered to it for transportation. The rea-
"sons upon which this rule is founded impose upon it
"the obligation to haul cars of other companies brought
"to it for the transportation over its own road. Peoria
"& P. R. Co. vs. Chicago, etc., R. Co." (Page 335.)

From this conclusion and opinion two of the judges of the Supreme Court of Iowa dissented on the express ground, as stated in a dissenting opinion, that the statute was unconstitutional in requiring a railroad company to deliver its cars to another company.

Before commenting on this case, we will notice another case cited and relied on by counsel for appellant in the same line, to wit, Jacobson vs. Wisconsin, etc., R. Co., 71 Minn. 519 (70 Am. St. Rep. 358). This is the case heretofore referred to, which was carried to this court where it is reported under the style of Wisconsin, etc., R. Co. vs. Jacobson, 179 U. S. 287, and in which, as we have already shown, this Court held in effect that the only question before it was the question as to the right of the State to require the railroads to *provide facilities* at the point of crossing for the interchange of traffic. This Court in its opinion does not discuss the question of the right of a State to require one railroad company to deliver its cars to another. And it appears from the opinion of the *State* court that this question is only discussed incidentally, the language of the court being as follows:

"It is contended that, even if the connections were
"made, neither railway company could be compelled to

"deliver its loaded cars to the other, to be carried with "their contents to their destination over the road of such "other; that to compel appellant to deliver up its cars "to be carried away from the line of its road to distant "points would be in violation of its charter contract, and "unconstitutional; that for this reason it is useless to "compel the making of the connection in question, and "therefore the legislative act fails of its purpose, and is "unconstitutional and void.

"Such interchange of cars between railroads is com- "mon, and almost universal practice; yet there are few "railroad charters which expressly authorize this prac- "tice. It would hardly be contended that such an act of "interchange is *ultra vires* upon the part of a railroad "company whose charter is silent as to such authority. "As incidental to the operation of its road, a railroad "company has the power to interchange cars with other "connecting companies, and this is the ordinary and "usual way of doing business. We are clearly of the "opinion that the legislature has the power to compel a "common carrier to do business in the ordinary and "usual way, and therefore may compel such interchange "of cars as incidental to the business for which the com- "pany was chartered. The Supreme Court of Iowa "reached the same conclusion in Burlington, etc., R'y "Co. vs. Dey, 82 Iowa, 312; see also Atchison, etc., R. "Co. vs. Denver, etc., R. Co., 110 U. S. 667; Peoria, etc., "R. Co. vs. Chicago, etc., R. Co., 109 Ill. 135; Michigan, "etc., R. Co. vs. Smithson, 45 Mich. 212; State vs. "Michigan, etc., R. Co., 83 Mo. 144."

Now as a matter of fact the judgment of the Minnesota court did not require the delivery of cars by one company to

another, and what was said by the court, as is manifest from the opinion, was simply in answer to the railroad company's argument that it would be no use for the court to require the connecting track to be put in between the two lines of railroad, because if such should be done there would then be no power to require the railroads to interchange cars; and the answer of the court to the argument is very much in line with the argument of the Iowa court in Burlington, etc., R. Co. vs. Dey, *supra;* the argument in the two cases being practically to the effect that it is *not beyond the power* of railroad companies to deliver their cars to other companies; and that the court takes judicial notice of the fact that this is a "common and almost universal practice" among railroad companies; and that the State has the power to command railroad companies "to do business in the ordinary and usual way;" in other words, that the State *has the power to compel railroad companies to do anything which they have theretofore done voluntarily.*

This argument finds a complete answer in the language of the Supreme Court of the United States in Lake Shore, etc., R. Co. vs. Smith, 173 U. S. 684. In this case the Supreme Court of Michigan had held valid the statute of that State compelling a company to sell thousand-mile tickets at a certain rate, it being shown in support of the validity of the act that the company had been in the past accustomed to doing this. On writ of error this court reversed this judgment, holding the act unconstitutional, and in the course of the opinion by Mr. Justice Peckham, said:

"It is no answer to the objection to this legislation to "say that the company has voluntarily sold thousand-"mile tickets, good for a year from the time of their sale. "*What the company may choose voluntarily to do furnishes*

"*no criterion for the measurement of the power of the* "*legislature. Persons may voluntarily contract to do* "*what no legislature would have the right to compel them* "*to do.* Nor does it furnish a standard by which to "measure the reasonableness of the matter exacted by "the legislature. The action of the company upon its "own volition, purely as a matter of internal administra- "tion, and in regard to the details of its business, which "it has the right to change at any moment, furnishes no "argument for the existence of a power in the legislature "to pass a statute in relation to the same business impos- "ing additional burdens upon the company." (Page 697.)

This language is so complete an answer to the argument of the courts of Minnesota and Iowa in the cases above mentioned, that nothing we could say would add to the force of it.

Moreover, the fact of which those two courts say they take judicial notice as to the practice of interchanging cars, a practice which they seem to think is *universal* and exercised *upon demand*, is in truth not a fact. Of course exchanges of cars are made very frequently, but they are made upon conditions and under circumstances which are regulated by contracts between the companies which make the exchanges, the companies always reserving the right to refuse to make such exchanges as conditions may vary, and as the interests and convenience of the several companies may require from time to time. In other words, railroad companies exercise over this character of property in this matter exactly the same rights and powers which individuals exercise over their property, to wit, the right to use it themselves when their interests so require, or to permit others to use it when the interests of the owner so demand or permit. In the case of Oregon Short Line R. Co. vs. Northern Pacific

R. Co., 51 Fed. Rep. 465 (afterwards affirmed in 61 Fed. Rep. 158), Mr. Justice Field in holding that a railroad company could not be required to receive cars from other companies, when it had cars of its own in which it could haul the freight, states the substance of a large amount of testimony of railroad men in that case on this subject of exchange of cars, and quotes quite at length from the testimony of the general manager of the Northern Pacific Railroad, in which he said:

> "The method of handling through business inter-
> "changed between railroads is controlled by various cir-
> "cumstances, in some cases by traffic contracts, which
> "provide for cars going through without transfer or
> "breaking bulk. In many cases it is controlled by con-
> "ditions of what we might term the car market; that is,
> "by the *car supply*. There are times when railroads east
> "of St. Paul give orders at the transfer to permit none
> "of their cars to go beyond St. Paul. There are times
> "when they permit their cars to go through without
> "breaking bulk. On the other hand, there are times
> "when the railroads north and west of St. Paul do not
> "take through cars, even when the roads tendering them
> "are willing to have them go through, because they
> "have sufficient of their own cars," etc. (51 Fed. Rep. 471.)

In the case at bar there is no allegation in the bill of complaint of any custom or practice on this subject of exchanging cars. It is true that there is one sentence in the affidavit of Mr. T. C. Powell in which he says: "It is the universal custom between reputable and solvent railroad companies to make delivery of carload lots of freight of any

and all kinds without exacting prepayment of freight under notices of the character above set forth, where the receiving common carrier becomes responsible for such delivery and collection of all charges on same." (Rec., p. 25.) But this statement is emphatically denied by Mr. Walker D. Hines, who, "on the contrary, says that every railroad company holds itself free to make such exceptions as it thinks proper and as it regards to be in its interest, and that it is not only not the universal custom, but it can not be said to be at this time the general practice, for a railroad company to deliver its cars to other railroad companies, since on account of the present scarcity of cars every company does all it can to keep its own equipment on its own lines." (Rec., 55.)

We repeat, therefore, that what the Supreme Courts of Iowa and Minnesota said they would take judicial notice of is in truth not a fact. Railroad companies do not exchange cars *on demand*, and under all circumstances and conditions; and the fact that they do make such exchange under some circumstances and under some conditions, which are within their control and are regulated by voluntary contracts, vests in no tribunal, national or State, judicial or legislative, the power to require them to deliver up their cars to other companies against their consent.

The case of L. & N. R. Co. vs. Williams, 95 Ky. 188, cited by counsel for appellant, was simply an action for personal injury where the plaintiff as an employe had been injured by a defective car received from the line of another road. The Court of Appeals simply held that the provisions of the Constitution of the State did not require the company to receive a defective car from another road. There was in fact no adjudication to the effect that it was required to receive cars in good condition. And there was neither adjudication nor intimation that the railroad company was itself required to deliver its own cars to other roads.

The case of Michigan Central Railroad Co. vs. Smithson, 45 Mich. 212, also cited by counsel for appellant, was a case of the same character as the Kentucky case above mentioned. An employe claimed to have been injured by a defective car which the defendant company had received from a connecting line. The court in that case held that the statute of Michigan required the defendant to receive and haul the cars of other lines. There was no statement or suggestion in the opinion on the subject of the duty of one railroad company to deliver its cars to other lines.

The case of Inman vs. St. Louis, etc., R. Co., 37 S. W. Rep. 37, cited by counsel for appellant, and being a decision by the Texas Civil Court of Appeals, has no bearing whatever on the question of the power to require railroad companies to interchange cars. It bears simply on the question of interchanging freight. There was neither assertion nor adjudication that it was the duty of the receiving company to deliver its cars to a connecting line.

We repeat, therefore, that the power does not exist, otherwise than in the exercise of the right of eminent domain, to take from the Louisville & Nashville Railroad Company its cars and give them to the Southern Railway Company.

VII.

Construction of State Constitution.

Finally, although we do not believe the question legitimately arises in this case, because we do not believe the State of Kentucky has a right to prescribe regulations for the government of interstate commerce, to which this case is expressly and exclusively confined, we submit that Section 213 of the Constitution of Kentucky, when properly construed, does not purport to require railroad companies to

deliver their own cars to other companies for use by the latter. The language is:

> "All railway, transfer, etc., companies . . . doing a "railway business in this State, shall *receive*, *transfer*, "*deliver and switch empty or loaded cars*, and shall move, "transport, receive, load or unload all the freight in car- "loads or less quantities, coming to or going from any "railroad, transfer, belt line bridge or siding thereon, "with equal promptness and dispatch, and without any "discrimination . . . . and shall so receive, deliver, "transfer and transport all freight, as above set forth, "from and to any point where there is a physical con- "nection between the tracks of said companies. But "this section shall not be construed as requiring any such "common carrier to allow the use of its tracks by the "trains of another engaged in like business."

It may be conceded that the language "shall receive, transfer, deliver and switch empty or loaded cars" requires the company to *receive* the cars of other companies when offered to it, and to *transfer and deliver such cars as are thus received*, but the language does not go beyond this. Certainly if it were intended to require a railroad company, against its consent, to give up its cars to another company, although it might be, and often is, in great need of them itself, such a requirement ought to be expressed in *unequivocal language*. Oregon Short Line vs. Nor. Pac. R. Co., 51 Fed. 475, opinion by Mr. Justice Field; same case, 61 Fed. 158, opinion by Mr. Justice McKenna; Chicago, etc., R. Co. vs. Osborne, 52 Fed. 914, opinion by Mr. Justice Brewer; Little Rock, etc., R. Co. vs. St. Louis, etc., R. Co., 63 Fed. 779, opinion by Judge Thayer. And we submit that the language here used does not meet this requirement. We can readily understand how a requirement might be made that a railroad

company should receive loaded cars from other companies and transport them, when the owners of the cars were willing to give them up and desired to have them transported. In fact, as we have already seen, the Supreme Court of Illinois has held that a railroad company is a common carrier of cars as well as it is of freight. Such a principle, therefore, might induce the legislature or a constitutional convention to make express provision, whether it might be considered as creative or only declaratory law, that all railroad companies should, without discrimination, receive and transport all cars offered to it, just as all freight offered to it. Yet this falls far short of a requirement that a railroad company shall, against its consent, be required to give up its own cars, which are its valuable property, to the possession and control of another. The language used in the Constitution of Kentucky is altogether consistent with the idea that railroad companies are required to receive and transport the cars of other companies, and to deliver such cars as they do thus receive and transport, but are not required to surrender and deliver their own cars against their consent to other companies.

The sentence in which this language occurs is very long and very much involved, but we submit that it falls short of expressing a requirement that the railroad company shall, against its consent, surrender its cars to another company for use by the latter.

CONCLUSION.

In conclusion we submit the following propositions:

1. The rights asserted by complainant in this case certainly did not exist at common law. If they were created by the Interstate Commerce Act, that act points out specific remedies for their vindication, which remedies are exclusive of all others (as to rights created by the act), and a suit in equity

for an injunction on behalf of the party claiming to be injured is not one of the remedies pointed out by that act.

2. Complainant has no such legal interests in the performance of those duties which it claims that defendant is disregarding as give rise to a cause of action in favor of complainant on account of the alleged violation of those duties.

3. This case does not in truth and in substance involve a question of the right to require a railroad company to deliver freight to a connecting carrier for transportation to a destination beyond the line of the receiving company, but really and truly and in substance involves a question as to the character of *delivery* which the railroad company can be required to make of freight *when it has reached its destination.* And, being thus understood, this case is controlled by Cov. Stock Yards Co. vs. Keith, 139 U. S. 128, which holds that a railroad company engaged in transporting live stock to a city has the right to establish a live stock depot in that city, through the instrumentality of a stock yards company, and to contract to deliver all live stock at that point, and that it can not be required to make deliveries at any other point.

4. If the case, however, be regarded as involving the duties of railroad companies in delivering freight to connecting companies for the purpose of transportation to points beyond the line of the receiving company, then we submit that, neither at common law nor under the Interstate Commerce Act, is a carrier required to receive freight marked for a destination beyond its own line, and much less is it required to surrender and deliver its own cars containing such freight to another carrier to be used in transporting the same to its destination over the lines of the latter, and especially where it is asked to look to the connecting carrier for the collection and ultimate payment of the charges on the freight.

5. If Section 213 of the Constitution of Kentucky be properly construed to require a railroad company to receive live stock in Tennessee, and to issue a bill of lading for the same showing their destination to be a point in Kentucky beyond the line of the receiving company, and on the line of a connecting company; or (with or without a bill of lading) to carry live stock thus received in Tennessee by a continuous shipment to a point in Kentucky, and there to deliver the same, in the cars in which they were received in Tennessee, to a connecting carrier in Kentucky for transportation by the latter to a point beyond the line of the receiving company, then this is an attempt by Kentucky to regulate interstate commerce, as strictly defined in County of Mobile vs. Kimble, 102 U. S. 691, and is therefore void.

6. There is no power in any tribunal, whether State or national, whether judicial or legislative, to require a railroad company, against its consent, to surrender and deliver its property, to wit, its cars, to another railroad company for use by the latter in the transportation of freight over the lines of the latter. To do so would be to take the property of the company without due process of law.

7. Section 213 of the Constitution of Kentucky, when properly construed, does not require a railroad company to deliver its cars, against its consent, to another company for use by the latter.

Respectfully submitted,

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Of Counsel.

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APPENDIX.

I.

English "Railway and Canal Traffic Act" of 1873, Section 11.

11. Whereas by Section Two of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form a part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be

offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf.

And whereas it is expedient to explain and amend the said enactment, be it therefore enacted, that

Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls or fares (in this act referred to as through rates).

Provided as follows:

1. The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded.

2. Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice, inform the company requiring the traffic to be forwarded whether they agree to the rate and route; and, if they object to either, the grounds of the objection.

3. If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration.

4. If any objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision.

5. If any objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the

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granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly.

6. If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall he suspended until the decision is given.

7. The Commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof.

8. It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

9. The prescribed period mentioned in this section shall be ten days, or such longer period as the Commissioners may from time to time by general order prescribe.

Where a railway company or canal company use, maintain or work, or are party to an arrangement for using, maintaining, or working, steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

II.

Interstate Commerce Act, Section 3.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

III.

Amendment to Interstate Commerce Act, Recommended by Interstate Commerce Commission December 1, 1888, but NOT ADOPTED by Congress.

(*2nd Interstate Commerce Commission Reports, Page 511.*)

The facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by every

such common carrier, at the request of any other such common carrier, of through traffic at through rates or fares. If any one of such common carriers shall desire to form a through route for interstate traffic or any class thereof over its own line or any part thereof, in connection with the line or any part of the line of one or more other common carriers, it shall address a request in writing to the other common carrier or carriers, describing therein the proposed route specifically, and naming proposed through rates or fares and division thereof for such traffic, and shall deliver such request to such other carrier or carriers, and also transmit a copy thereof to the commission hereinafter named. If the other common carrier or carriers shall not, within ten days after receiving such request, make and serve and file with the commission, written objections either to the proposed route or to the proposed rates, fares or divisions, the same so far as not objected to shall be deemed agreed to; but if either the route, the rates, or fares, or the divisions, are objected to, the objections shall be stated in writing and transmitted to the commission, and the commission shall then have power to determine whether, having regard to all the circumstances, the route proposed is demanded in the public interest and is a reasonable route for the traffic, and if the commission shall so find, and the rate or divisions are not assented to, the commission shall have the further power to prescribe the same; but the commission in any case, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part thereof, as well as any special charges which any such common carrier may have been entitled to make in respect thereof, and it shall not be lawful for the commission in any case to com-

pel any company to accept lower mileage rates than the mileage rates which such company may, for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

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Office Supreme Court
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JAMES H. McKENNEY

No. 486 149

Supreme Court of the United States.

CENTRAL STOCK YARDS COMPANY, - - - Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE

(Commenting on Judge Miller's Opinion, printed and filed since submission in this court.)

APPENDIX.

Opinion by Judge Henry S. Barker, Judge of the Jefferson Circuit Court, in Union Stock Yards vs. L. & N. R. Co.

HELM BRUCE,
Counsel for Appellee.

P. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States

CENTRAL STOCK YARDS COMPANY, ... *Appellant*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

Since the argument of this case counsel for appellant has printed and sent to the clerk, for distribution among the members of the court, an opinion of Judge Miller of the Jefferson Circuit Court (of Kentucky) in a case of the same style as the one at bar, though, in fact, a different case. Of course, we do not object to this, and, in fact, it was rather suggested by the court during the argument. But as it was not part of the record, nor in any manner before the court so that it could be commented upon at the argument, and as *another opinion* has been delivered by a different judge of the same Jefferson Circuit Court, reaching quite different conclusions, we hope we may be allowed the privilege of making some suggestions as to Judge Miller's opinion, and of presenting to the court also the opinion of Judge Henry S. Barker, who at the time of the delivery of this opinion was a judge of the Jefferson Circuit Court, but has since become, and is now, a judge of the Court of Appeals of Kentucky.

The opinion of Judge Miller was delivered on a mere motion for a preliminary injunction, before answer filed by the defendant. The statement by the court of the defenses pre-

sented is merely the court's attempt to state the substance of arguments and affidavits, and is not an accurate statement of what we understood our arguments and affidavits to mean. Moreover the affidavits filed in that case were not the same as those filed in the case at bar, though of course there are many points of similarity.

After the entry of the preliminary injunction a motion was made before a single judge of the Court of Appeals to dissolve it; but he declined to disturb the status of the litigation, saying "the case will probably come before the Court of Appeals for final judgment in a short time." That was in December, 1901, more than two years ago, and the case is still in the Circuit Court, having never been finally decided, and having been under submission for nearly a year; though in the meantime defendant has been compelled to obey the injunction.

Of course it will be observed that Judge Miller does not in his opinion mention interstate commerce. He discusses the case purely as a Kentucky affair, and states conclusions as to common law duties and obligations, and as to the meaning and effect of certain provisions of the Constitution of Kentucky. His views are very radical and in some respects are in direct conflict with those which had theretofore been expressed in an opinion by Judge Barker in the case of *Union* Stock Yards vs. Louisville & Nashville R. R. Co., which is printed in full in an appendix hereto, and will be referred to presently.

It is somewhat difficult to state exactly Judge Miller's conclusions as to the common law applicable to the case. He seems to conclude that *even at common law*, independent of the Kentucky Constitution, the plaintiff would be entitled to the relief asked (page 14 of printed opinion), and yet when he comes to discuss cases relied on by defendant to support a

contrary view of common law obligations, such as Covington Stock Yards vs. Keith, 139 U. S. 128, and Butchers' Stock Yards vs. L. & N. R. R. Co., 67 Fed. R. 36, he says of them that they were common law cases, and that "as this case is purely and simply a switching case under the 213th section of the Constitution, those cases can not be said to be in conflict with the conclusion heretofore reached." (Page 15.)

In treating of the provisions of the Constitution Judge Miller holds that the case is really covered not only by Section 213, which is quoted in full in our original brief (page 74), but also by Section 214, which is as follows:

> "EXCLUSIVE OR PREFERENTIAL CONTRACT FOR-
> "BIDDEN.—No railway, transfer, belt line or railway
> "bridge company shall make any exclusive or preferential
> "contract or arrangement with any individual, associa-
> "tion or corporation, for the receipt, transfer, delivery,
> "transportation, handling, care or custody of any freight,
> "or for the conduct of any business as common carrier."

Speaking of this section, Judge Miller says:

> "Section 214 of the Constitution does not mean that a
> "carrier must build platforms or chutes, etc., for any and
> "all who may want stock yards on the line of the road,
> "but it *does mean* that all individuals and all corporations
> "engaged in the stock yards business must be treated
> "alike, and no exclusive or preferential contract for the
> "care and custody of stock can be made." (Page 9 of opinion).

In other words, Judge Miller holds that Section 214 of the Kentucky Constitution in effect nullifies the principles established by Covington Stock Yards vs. Keith, 139 U. S.,

and Butcher's Stock Yard vs. L. & N. R. R. Co. 67 Fed. R.

Now, to show what different views of these provisions of the Kentucky Constitution as to commerce have been taken by different judges, we append hereto the opinion, heretofore mentioned, of Judge Barker, which is based on the view taken by the Court of Appeals of Kentucky of the general purpose of these various provisions as to commerce. Judge Barker's opinion was delivered in the case of Union Stock Yards vs. L. & N. R. Co., which was exactly like the present case, except that the Union Stock Yards are adjacent to the tracks of the Louisville & Nashville Railroad Company, while the Central Stock Yards are adjacent to the tracks of the Southern Railway.

Judge Barker, as will be seen from this opinion, held that the Constitution of Kentucky was not intended to affect, and did not affect, the principles asserted in Covington Stock Yards vs. Keith, and Butchers' Stock Yards vs. L. & N. R. Co.; that, whether Section 213 or 214 be considered, the only purpose was to prevent unjust discrimination, and he based this conclusion very largely on the view taken by the Court of Appeals of Kentucky of the general scheme of these constitutional provisions, as expressed in its opinion in Commonwealth of Kentucky vs. L. & N. R. Co., 108 Ky. 628 (22 Ky. Law Rep. 328), in which the Court of Appeals, in stating the effect of various constitutional and statutory provisions on the subject of commerce, speaks as follows:

"Section 213 requires companies to receive and handle "loaded and empty cars and freight in carloads, etc., "coming from other companies *without discrimination or* "*preference*, etc. Section 214 was designed to compel "the carrier to perform the service of receiving, transport- "ing and handling freight without exclusive or preferen- "tial contract or arrangement, and secures *equality of*

"*service*, leaving the succeeding section to secure *equality* "*of charges.*" (Our italics. 108 Ky. 633.)

And again, in the same opinion, as pointed out by Judge Barker, the court, referring to the English Railway and Canal Traffic Act, and to the Interstate Commerce Act, says that "the thing aimed at in all these statutes is the prevention of unjust discrimination;" and that the aim of the Kentucky Constitution, referring especially to Sections 196, 214 and 215, is the same; the Court of Appeals saying:

> "The purpose was to secure equality between shippers, "and prevent injustice or unjust discrimination. It can "not be maintained that the convention contemplated "that there should be no discrimination, for it was "notorious that there were many discriminations not "regarded as unlawful, and Section 194 expressly recog- "nizes that such discriminations as are not unjust may "be made." (108 Ky. 644).

It is true that in the immediate connection in which this last quoted language is used the court does not expressly refer to Section 213; but it does expressly mention Sections 214 and 215; and it had, as above shown, previously coupled these several sections together in speaking of them in a preceding part of the opinion (page 633), and it is manifest that all belong to the same scheme of legislation.

For convenience of the court, these several sections, 196, 213, 214, and 215 are printed in juxtaposition in the appendix to this brief, immediately following Judge Barker's opinion.

Thus it will be seen that the Court of Appeals of Kentucky, manifestly treats the main purpose of Section 213 as being to prevent *unjust discrimination* in the matters there treated of, and not as requiring absolutely the interchange of cars under all circumstances and conditions.

But Judge Miller treats Section 213 as establishing an iron-bound rule, applicable under all circumstances and conditions covered by its terms, and places a literal construction upon these terms.

If we carry out this principle of construction, the provisions of Section 213 will become intolerable. The section does not apply alone to car-load lots of freight, but to "car loads or less quantities," and requires carriers to "load or unload all the freight, in car loads or less quantities," at points of physical connection. Now, the Louisville & Nashville Railroad Company has physical connection with several different railroad and bridge and transfer lines between the point where it enters the city of Louisville and its general freight depot. If it is hauling a car load of miscellaneous freight, consigned to various consignees in the city, can it be compelled to stop at the Southern Railway crossing and take out and deliver to the Southern Railway a keg of nails consigned to some one who lives near the Southern's depot; and then run along till it reaches a connection with, say, the Illinois Central's tracks, and again stop and deliver to it a box of soap which may be consigned to some one living near the Illinois Central's depot; and so again at an intersection with the Louisville Bridge Company's tracks, etc., etc.? This would cause great delay and annoyance, and would be intolerable. It is not possible to believe the Constitution means this, and yet it comes within its literal terms as much so as the case before Judge Miller, or before this court. If such construction be adopted, and the section be held to be applicable to interstate commerce, it is not only a *regulation* of interstate commerce, but a *great burden* upon it.

Again, we call the court's attention to the fact that the language of the Court of Appeals in Commonwealth vs. L. & N. R. Co., 108 Ky., *supra*, in summarizing the effect of Section 213 of the Constitution, directly supports the con-

tention in our original brief (pages 100, etc.), that the language of this section (even literally read) does not require a company, against its will, to *deliver its own cars* to another company, but only to *receive* cars *from* other companies that may offer them. The language of the court, as heretofore quoted, is:

> "Section 213 requires railroad companies to *receive* "and handle loaded and empty cars and freight in car "loads, etc., *coming from other companies* without discrimi- "nation or preference, etc." (Our italics. 108 Ky. 633.)

As to Judge Miller's statement that about five miles of transportation are saved in delivering to the Central Stock Yards rather than to the Bourbon Stock Yards, we call attention to the fact that accurate measurement shows a difference of *one-tenth of a mile* from the South Louisville yards of appellee to the two respective yards (Rec., 54).

In conclusion, we will simply say that if Section 213 means what Judge Miller says it means, and railroad companies must deliver up their cars to connecting lines, there is absolutely no provision made, either by Constitution or Statutes, to regulate such business; no provision as to how long a connecting line thus receiving another company's car may keep it; no provision as to what use it may put it to; no provision as to what it must pay for it. All this is left absolutely without regulation. A company, however much it needs its cars, must let them go; and the connecting company can deliver them to the next connecting company, etc., etc.; and there is no provision whatever as to when they shall be returned, or what shall be paid for their use.

Respectfully submitted.

HELM BRUCE,
Counsel for Appellee.

February 4, 1904.

APPENDIX.

I.

Opinion by Judge Henry S. Barker.

JEFFERSON CIRCUIT COURT.

Union Stock Yards, ... *Plaintiff,*

vs.

The Louisville & Nashville Railroad Company, ... *Defendant.*

Opinion.

This action was instituted by the plaintiff, a corporation engaged in the stock yards business in Louisville, Ky., against the defendant, a railroad corporation, for the purpose of obtaining a mandatory injunction requiring the defendant to deliver to the plaintiff, on its private switch, which connects with defendant's passenger line running along Pocahontas street, such car load lots of stock as may from time to time be consigned to it, by its customers, and to receive on said switch for shipment such car load lots of live stock as it may from time to time desire to ship out of Louisville to its customers.

The defendant makes no concealment of the fact that it has in the past refused to deliver or receive live stock on

the plaintiff's switch, or that, unless required to do so by the order of this court, it intends to continue such refusal in the future. As a justification of such refusal, it urges, among other things, the following propositions: First, that the plaintiff corporation is not in good faith carrying on a public stock yard fully and sufficiently equipped with the facilities necessary for the operation of such business. Second, it denies that plaintiff is the owner and entitled to operate the switch described in the petition. Third, it alleges that many years ago it established by a contract with the Bourbon Stock Yards Company, a corporation also engaged in operating a public stock yard in Louisville, a general live stock depot on the grounds of the latter company, whereat it delivers rapidly and safely, without favor or discrimination, all of the live stock hauled over its lines, billed to Louisville, and where it receives for shipment all live stock to be shipped over its lines out of the city; and that this depot is amply sufficient for all of the needs of the live stock business in the City of Louisville. Fourth, it alleges that the switch in question is unsuitable and insufficient for the needs of the live stock business, and, being located on one of its main passenger tracks or lines, the delivery and shipment of live stock on said switch entails upon it a greater burden in time, cost and hazard than if the delivery or shipment took place at the defendant's general live stock depot in the yards of the Bourbon Stock Yards Company.

There was little, if any, contrariety of evidence adduced upon the hearing of the motion for an injunction, and I have had no difficulty in reaching the conclusion that the plaintiff is, in good faith, embarked in the live stock business, and that, while not possessed of as ample facilities as the Bourbon Stock Yards Company, which is a much older company, it is reasonably well equipped for such patronage as a beginner

may expect to receive; that the men composing the corporation are honest, high-minded stock men, with all the capital and energy necessary to make accommodation grow with the business in which they are engaged; that the plaintiff is the owner and entitled to the use of the switch in question; that the defendant corporation long before the creation of the plaintiff corporation, in good faith, entered into a contract with the Bourbon Stock Yards Company by which is established a general live stock depot for Louisville in the yards of the Bourbon Stock Yards Company, and employed said corporation as its agent to load and unload all the live stock shipped to or from Louisville by the defendant corporation; that said depot has been operated for the purposes mentioned under said contract, from the date of its establishment, until the present time, and is reasonably sufficient for the requirements of the live stock market in Louisville; that in the operation of said depot, as a depot, no invidious or unjust discrimination is made between consignees' or consignors' live stock; that there is no charge made for yardage, nor for the service of loading or unloading stock. That it entails upon the defendant a much greater burden in time, cost and hazard to deliver plaintiff's stock on the switch in question than to deliver it at the defendant's depot in the Bourbon Stock Yards. That it would greatly advantage the plaintiff's business to have its stock shipped to and from its own switch by the defendant company.

From the establishment of these facts arise two questions of law, the solution of which must decide this case. First, under the law as it now exists in Kentucky, may a railroad corporation establish a general live stock depot in the yards of a stock yards corporation, where, through the agency of said stock yards company and its employes, all the live stock shipped to or from a city is loaded and unloaded, provided

the service in said depot is free and equal, and said depot is sufficient for the requirements of the live stock business in said city?

Second, if the foregoing proposition be answered in the negative, may one stock yards corporation demand of a railroad corporation a special service to it in the delivery or shipment of its stock, when such service entails a substantial increase in time, cost or hazard to said railroad corporation, over a similar service rendered to a business rival of said stock yards corporation in the same city?

These are grave questions, and it is highly important, both to the parties to this litigation and to the public, that the law governing them be clearly ascertained and fully administered.

By the rules of the common law, common carriers are held to exercise a *quasi* public trust, and are forbidden to make unjust or unlawful discriminations between their patrons. In the Constitutions or the statutes (sometimes in both), of nearly—if not quite—all the States of the Union, and in the Act of Congress known as the Interstate Commerce Act, there are provisions bearing upon and seeking to regulate and control this subject. The language used in these several enactments varies in its verbiage, but, when scanned closely, means about the same thing. These various enactments are merely declaratory of and seek, by means of penalties, to more efficiently and thoroughly enforce the provisions of the common law. This is expressly decided in the case of the Commonwealth vs. the L. & N. R. R., 22 L. R. 328, wherein the Court of Appeals say:

> "The common law required common carriers to serve "all alike. In aid of this rule of the common law, the "English Railway and Canal Traffic Act was passed, in

"1854, to forbid and punish discrimination. This was "followed by the Interstate Commerce Act of the United "States, and similar statutes and constitutional provisions "of many of the several States. The thing aimed at in "all of these statutes is the prevention of unjust discrim- "ination. In the same line is Section 196 of our Con- "stitution: 'Transportation of freight and passengers "by railroad, steamboat, or other common carrier, shall "be so regulated by general law as to prevent unjust "discrimination.' Also Section 214: 'No railway "company shall make any exclusive or preferential con- "tract or arrangement . . . . for the conduct of any "business as a common carrier.' Section 215 is a part "of the scheme covered by Sections 196 and 214. It "requires all railroads to transport in the same manner, "for the same charges, and for the same method of pay- "ment, freight of the same class, for all persons, from "and to the same points, and upon the same conditions. "The purpose was to secure equality between shippers "and to prevent injustice, or unjust discrimination. It "can not be maintained that the convention contem- "plated that there should be no discrimination, for it "was notorious then that there were many discrimina- "tions not regarded as unlawful, and Section 194 "expressly recognizes that such discriminations as are "not unjust may be made."

After setting forth the different expressions used in the various statutes bearing upon the subject, the court say :

"All these expressions in the various statutes on the "subject of unjust discrimination mean the same thing, "and the authorities determining the effect of the various

"statutes on the subject are directly in point. This (the "prevention of unjust discrimination) is the purport of "every law on the subject involved, to which our atten- "tion has been called, and enactments on this character "are found in perhaps every State in the Union. The "purpose of all these are the same. Our own statute "only prohibits different or discriminating charges 'for a "like and contemporaneous service.' Our Constitution "does not use these particular words, but uses the broader "and more comprehensive expression, 'upon the same "conditions.'"

I have set out the exact language of the court in this the leading case in this State on the subject in hand, at perhaps tedious length, because I deem it important to ascertain in the outset whether the rules of the common law are to be considered in the decision of this question, or whether our Constitution provides a new and revolutionary rule upon the subject in hand. This question was the pivotal point in the case cited; it being contended, both at bar in the argument and afterwards by some of the court in their deliberations, that the constitutional provisions under examination afforded a new and rigid rule forbidding *all* discrimination among persons doing business with common carriers, without reference to the justice or injustice of the same. This was the real battle ground, both at bar and in the consultation room, as is clearly shown by the dissenting opinion. But the opinion of the court most clearly determines that all of the constitution and statutory provisions of our State contain one general scheme in aid of the common law rule, forbidding to common carriers not all discrimination, but all unjust or unreasonable discrimination between their customers or patrons; and this being

true, decisions of similar propositions arising at common law by judicial tribunals are directly in point.

The question involved in the first proposition arose in the case of the Covington Stock Yards vs. Keith, 139 U. S. This case can not be distinguished in principle from the case at bar. There, as here, were two rival stock yards on the line of the railroad; there, as here, the railroad had a contract with one of these to establish a general live stock depot in its yards, where all live stock hauled, or to be hauled, by it was received or shipped; but with this difference, that the stock yards company which undertook, as agent of the railroad, to handle the stock, made a charge for yardage against all shippers. This, the Supreme Court held, it could not do, but held that if no charge was made for yardage, and no preferences shown in the manner of handling the stock, the plaintiff stock yards company would be without just ground for complaint. It was held in this case that it was the right and duty of the railroad company, as a common carrier of live stock, to establish and maintain a live stock depot in Covington, the use of which should be free to all shippers of live stock and should be sufficient for the requirements of the live stock business in that city, and that, this being provided, it was no concern of the complaining company that the railroad company contracted with another (and rival) stock yards company to discharge for it this duty to the public. The deduction is clearly drawn that no advantage which arises out of, and is merely incidental to, the discharge by a common carrier of a duty to the public is an unjust or preferential discrimination at the common law.

The same question arose in the case of the Butchers, Stock Yards Company vs. the L. & N. R. R. Co., 67 Federal R. The opinion of the Circuit Court of Appeals, which was delivered by Judge Taft, cites the Keith opinion

at great length, and, of course, with approval. It seems to me that these two cases are conclusive of this branch of the case. If the opinions of Circuit Judges Baxter and Baker, cited by counsel for plaintiff, are antagonistic to the opinions of the Supreme Court and the Circuit Court of Appeals, they must yield to superior authority, as those learned judges would themselves hasten to do, if they sat in this case.

It takes but little reflection to see that it can make no practical difference to the plaintiff whether the Louisville & Nashville Railroad Company operates the live stock depot itself, or employs the skilled stock men of the Bourbon Stock Yards Company to load and unload their live stock for them; while it is evident that by the use of such skilled stock men the public obtains a better service. The evidence shows that the contract between the L. & N. R. R. Co. and the Bourbon Stock Yards Company was made years before the incorporation of the plaintiff company, and there is nothing in the record to show that there was in Louisville at the time any other stock yards than the Bourbon; it was the duty of the railroad to provide a depot for live stock, and it seems to me it made the best arrangement for the general public by employing people who are skilled in the handling of live stock to perform this duty. At this depot, so organized and maintained, the live stock of the plaintiff is received and handled without charge, and without any discrimination against it in the handling. This, under the authorities before cited, and which, I think, control this case, is all that the plaintiff can lawfully demand.

As to the second proposition, the evidence shows that the plaintiff's yards lie along Pocahontas street, whereon is one of the defendant's main passenger tracks. Connecting these tracks with plaintiff's yards is a short spur switch, put in by

the lessor of plaintiff for the shipment and delivery of dead freight. No live stock has ever been delivered on or shipped from this switch except by order of this court. The evidence shows clearly that there is a vast difference between the handling of live stock and the handling of dead freight—that the latter can be kept by the railroad company for an indefinite time in its distributing yard, and be delivered at the convenience of the carrier; whereas live stock, for at least a large part of the year, would be in danger of perishing by being kept even for a few hours in the cars after arrival, and must suffer at all times by even a slight delay in the unloading. The track along Pocahontas street, as stated before, is one of defendant's main passenger lines, on which its passenger trains of necessity have the right of way; it is often both inconvenient and hazardous to undertake to deliver freight upon the switches touching this line; in the case of dead freight, the carrier simply awaits its opportunity, and delivers when it can with safety; but with live stock it must of necessity confront the hard dilemma of either seeing the animals perish or be seriously injured, on the one hand, or endanger the lives of its passengers and its employes, on the other.

If the plaintiffs can demand this special service, then the Packing Company and Vissman & Company, who have switches connecting their property with the Pocahontas street line, and any and all others who may open a live stock business along said street may have a similar special service, and it would be entirely within the bounds of probability that the defendant company would in a short time have to abandon altogether the passenger traffic over said street.

We have seen that the Court of Appeals in the case of Commonwealth vs. L. & N., 22 L. R., have decided that all of the provisions of the Constitution and statutes relating

to discriminations form one scheme in aid of the common law rule against unjust or unreasonable discrimination, and that, where the conditions are substantially different, the discrimination is not unreasonable or unjust, and, therefore, not forbidden. In the case cited, the Court of Appeals held that between two consignees of coal in the same town, one being a miller and the other a coal dealer, the R. R. Co. might charge the miller less for steam coal than it charged the dealer in coal, because the miller used the coal to manufacture flour, and as this was shipped over the railroad company's line, it obtained an additional freight rate, and therefore the conditions were not the same. If a mere monetary advantage authorizes a discrimination between shippers, for a greater reason is a discrimination allowable where the difference in the conditions of service entails a greater hazard to life and property.

Learned counsel for plaintiff, both in the argument at bar and in their brief, contended that this case rests upon the provisions of Section 213 of the Constitution rather than Sections 196, 214 and 215. I do not see the utility of the contention, since the Court of Appeals have decided that the question of discrimination must be determined by the rules of the common law; but if there is a difference, the courts have decided the contention against the plaintiff:

> "Sec. 213 requires railroad companies to receive and "handle loaded and empty cars, and freight in carloads, "etc., coming from *other companies* without discriminating "preference, etc." (L. & N. R. R. Co., 22 L. R.)

And in the case of the Louisville & Nashville R. R. vs. Williams, 95 Ky. 199, the court held that it was not the duty of a railroad company, under the provisions of Sec. 213 of

the Constitution, to receive from another company a car in a dangerous condition, or one the construction of which made it dangerous to handle. This was a damage suit against the railroad company, and the evidence showed the car causing the damage was received from another company. The defendant railroad sought to shield itself from responsibility by pleading that under Sec. 213 of the Constitution, it was bound to receive and transport the cars, etc., etc., but the court said, not so—the section in question did not require any service which endangered life and limb. Applying that principle to the case at bar, it becomes imperative that I should hold that even if Section 213 controlled this case, still the defendant is not bound to perform under its provisions any service which endangers the lives of its passengers or employes, since there can not be a difference in principle between a service in handling a car which is in a dangerous condition, and a service which entails the delivery of a car at a point that would create danger.

The motion for an injunction is overruled.

II

Sections of the Kentucky Constitution.

Sec. 196. Transportation—Charge for—Common Law Liability. Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.

Sec. 213. Freight and Cars to be Handled and Transported Without Discrimination. All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight, in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business.

Sec. 214. Exclusive or Preferential Contract Forbidden. No railway, transfer, belt line, or railway

bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier.

Sec. 215. FREIGHT TO BE TRANSPORTED AND HANDLED FOR ALL PERSONS ON SAME TERMS. All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner, and for the same charges, and for the same method of payment.

13685

Supreme Court of the United States.

No. 149.—October Term, 1903

The Central Stock Yards Company, Appellant, *vs.* The Louisville & Nashville Railroad Company.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[February 23, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court of Appeals affirming a decree of the Circuit Court which dismissed the plaintiff's bill. 118 Fed. Rep. 113. The bill was brought by the appellant, a Delaware corporation, against a Kentucky corporation, to compel it to receive live stock tendered to it outside the State of Kentucky for the Central Stock Yards station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and by agreement between the two companies the Central Stock Yards are the "live stock depot for the purpose of handling live stock to and from Louisville" on the Southern Railway. The defendant, by a similar arrangement, has made the Bourbon Stock Yards its live stock depot for Louisville, and declines to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon yards. There are physical connections between the Louisville and Nashville and the Southern tracks at a point between the two stock yards, which is passed by the greater portion of the live stock carried by the Louisville and Nashville Company, and at another point which would be more convenient for delivery a little further to the northward. The details are unimportant, except that in order to deliver, as prayed, the defendant would be compelled either to build chutes or to hand over its cars to the Southern Railroad, after having made some contract for their return. The right is claimed by the plaintiff, under the Interstate Commerce Act of February 4, 1887, c. 104, § 3, 24 Stat. 379, making it unlawful for common carriers subject to the act to give unreasonable preferences, and requiring them to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective

lines, and for the receiving, forwarding and delivering of property to and from their several lines and those connecting therewith. The right is claimed also under the Constitution of Kentucky, especially § 213, requiring Kentucky railroad companies to receive, deliver, transfer and transport freight from and to any point where there is a physical connection between the tracks, as we understand it, of the railroad concerned and any other.

For the purposes of decision we assume, without expressing an opinion, that if the Act of Congress and the Kentucky Constitution apply to the case they both confer rights upon the plaintiff. As to the former compare §§ 8, 9, and the act of February 19, 1903, c. 708, § 2, 32 Stat. 847, 848, *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128; *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 610, 620. The rights under the latter, which are relied upon especially, could not be established without discussion. Compare *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. Div. 441; *Johnston* v. *Consumers' Gas Company of Toronto*, [1898] A. C. 447. For the same purpose we further assume that such rights as the plaintiff has may be enforced by bill in equity. See *Interstate Stock-Yards Co.* v. *Indianapolis Union Railway*, 99 Fed. Rep. 472. We also lay on one side the question whether the section of the Constitution of Kentucky is or is not invalid as an attempt to regulate commerce among the States. For we are of opinion that the defendant's conduct is not within the prohibitions or requirements of either the Act of Congress or the Constitution of Kentucky, as those provisions fairly should be construed.

The Bourbon Stock Yards are the defendant's depot. They are its depot none the less that they are so by contract and not by virtue of a title in fee. Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the act of Congress. Suppose that the Southern Railway station and the Louisville and Nashville station were side by side and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard. These views are sanctioned by what was said in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128. The fact that the plaintiff's stock yards are public does not change the case. See further *Butchers' & Drovers' Stock-Yards Co.* v. *Louisville & Nashville R. R.*, 67 Fed. Rep. 35.

If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Company* v. *Keith*, the defendant has a right to unload them where its appliances for unloading are, and cannot be required to establish another set hard by. On the other hand, if the cattle are to remain in the defendants' cars it cannot be required to hand those cars over to another railroad

without a contract, and the courts have no authority to dictate a contract to the defendant or to require it to make one. *Atchison, Topeka & Santa Fe R. R.* v. *Denver & New Orleans R. R.*, 110 U. S. 667, 680. The consensus of the Circuit Courts is to the same effect. *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 629, 630; *Little Rock & Memphis R. R.* v. *St. Louis, Iron Mountain & Southern Ry.*, 41 Fed. Rep. 559; *Chicago & Northwestern Ry.* v. *Osborne*, 52 Fed. Rep. 915; *Oregon Short Line & Utah Northern Ry.* v. *Northern Pacific R. R.*, 61 Fed. Rep. 158, affirming *S. C.*, 57 Fed. Rep. 465; *Little Rock & Memphis R. R.* v. *St. Louis Southwestern Ry.*, 63 Fed. Rep. 775; *St. Louis Drayage Co.* v. *Louisville & Nashville R. R.*, 65 Fed. Rep. 39; *Allen* v. *Oregon R. R. & Navigation Co.*, 98 Fed. Rep. 16. All that was decided in *Wisconsin, Minnesota & Pacific R. R.* v. *Jacobson*, 179 U. S. 287, was that by statute two railroad companies might be required to make track connections. So much of the statute as undertook to regulate rates was not passed upon. See *Minneapolis & St. Louis R. R.* v. *Minnesota*, 186 U. S. 257, 263. There is no act of Congress that attempts to give courts the power to require contracts to be made in a case like this.

What we have said applies, in our opinion, to the Constitution of Kentucky with little additional argument. The requirement to deliver, transfer and transport freight to any point where there is a physical connection between the tracks of the railroad companies, must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line. It cannot be intended to sanction the snatching of the freight from the transporting company at the moment and for the purpose of delivery. It seems to us that this would be so unreasonable an interpretation of the section that we do not find it necessary to consider whether under any interpretation it can be sustained. In view of the course taken by the argument we may add that we do not find a requirement that the railroad company shall deliver its own cars to another road. The earlier part of section 213 provides that all railroads "shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in carloads or less quantities, coming to or going from any railroad, . . . with equal promptness and dispatch, and without any discrimination. . . ." Promptness and the absence of discrimination are the point, and that shows that the words "coming to or going from any railroad," qualify the words "empty or loaded cars" as well as "freight," and therefore that the cars referred to are cars from other roads. The same thing is shown by the word "receive," which is the starting point of all that relates to cars. See *Louisville & Nashville R. R.* v. *Commonwealth*, 108 Ky. 628, 633. The other sections of the Constitution need no special remark.

We have discussed the case as if the two stock yards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as *bona fide* further transportation over a connecting road and within the requirements of the Kentucky Constitution. However that may be, we are of opinion that the court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad. As we have said, the delivery would have to be made either by unloading or by the surrender of the defendants' cars.

Decree affirmed.

Mr. Justice McKENNA concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.